89-628

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ISSUE PRESENTED

In a case where a plaintiff has challenged a general purpose government program which serves many purposes, some of which may injure the plaintiff, some of which may help the plaintiff, and a majority of which have no impact on the plaintiff:

Whether standing lies for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations.

LIST OF PARTIES

Mountain States Legal Foundation (MSLF or Foundation) and the Minerals Exploration Coalition were Defendant-Intervenors-Appellees in the United States Court of Appeals for the District of Columbia Circuit.

The following were Defendants-Appellees in the United States Court of Appeals for the District of Columbia Circuit: Robert F. Burford, in his official capacity as Director of the United States Bureau of Land Management (Mr. Burford has been replaced in that capacity by Cy Jamison); Donald P. Hodel, in his official capacity as Secretary of the Interior (Mr. Hodel has been replaced in that capacity by Manuel Lujan, Jr.); and the United States Department of the Interior.

ASARCO, Inc., was granted intervention in the District Court proceedings by the District of Columbia Court of Appeals. ASARCO, which was an Applicant for Intervention at the time, did not file a Notice of Appeal in the case at bar.

The National Wildlife Federation was Plaintiff-Appellant in the United States Court of Appeals for the District of Columbia Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

Review is sought of the opinion reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989), appearing at pages App. 15-App. 42 of the Appendix. The District Court's opinion, *National Wildlife Federation v. Burford*, No. 85-2238 (filed Nov. 4, 1988), and order appear at pages App. 1-App. 14 of the Appendix.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit rendered judgement against the Petitioners on June 20, 1989. The mandate was ordered to issue on or about August 4, 1989.[1] On September 11, 1989, Chief Justice Rehnquist entered an order granting the Petitioners an extension of time in which to file this petition to and including October 18, 1989.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

This action is based on Article III standing requirements of the United States Constitution.

STATEMENT OF THE CASE

The Withdrawal Review Program

The Respondent in this case has undertaken a sweeping challenge of a broad, general purpose, statutorily mandated, government program: a program to eliminate unneeded withdrawals and classifications of the public lands. Years ago when the withdrawals and classifications in question were created, they served a multitude of

[1] The federal government's motion to stay mandate pending petition to this Honorable Court was denied by the Court of Appeals on August 1, 1989.

purposes. However, since the purposes originally sought to be served by the withdrawals and classifications had ceased to exist, those withdrawals and classifications of the public lands were eliminated by the Bureau of Land Management (BLM) under its Withdrawal Review Program. *See* 43 U.S.C. § 1714(*l*) (1982).

The public lands of the United States are generally available for a host of uses under numerous statutes. Both public and private entities can take advantage of opportunities to use the federal domain. For example, a private person can stake a mining claim,[2] request a land exchange to make management of one's ranch easier,[3] or establish a communication site.[4] A public entity can build a dam, establish a military reserve, or create a park or wildlife refuge. Hundreds or thousands of other possible uses exist.

If an anticipated future use of a portion of the public lands would be exclusive of other uses, then the federal land management agencies can "withdraw" that land from the public domain. For example, some of the withdrawals in this case involved proposed dam sites. If the government wishes to build a dam, then almost all other permanent uses in the flooded area are incompatible. The prudent federal land manager precludes those incompatible uses by making a withdrawal. Land classification works in a similar fashion. Many areas affected by this suit were classified for disposal or sale. Again, other

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[2] *See*30 U.S.C. § 22 (1982).

[3] *See*43 C.F.R. Part 2200 (1988).

[4] *See*43 U.S.C. § 1732(b) (1982).

permanent uses in areas to be sold would be incompatible, so the prudent federal land manager uses classification to restrict conflicting uses. *See* App. 18-19.

The need for a withdrawal review program became evident as many of the original purposes for which land was withdrawn or classified failed to come to fruition. Many dams that were proposed were never built. Most of the area that was classified for sale was never sold, and Congress subsequently changed its policy to discourage sale of the public lands. By the 1950s, it became clear that there were thousands of withdrawals and classifications which served no purpose except to obstruct efficient land use and management.

Withdrawal review began as an internal program of the Bureau of Land Management in 1956. 2 C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 420 (1969). Apparently, little progress was made under that early program, so, in 1976, Congress mandated the Withdrawal Review Program at issue here and set a deadline for completion of that program in the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1714(*l*) (1982). As a result, in the late 1970s, the Carter administration set up procedures for the Withdrawal Review Program and began to make the revocations that are challenged in this case. The Reagan administration continued to revoke unneeded withdrawals.[5]

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[5] In its complaint, the Respondent chose to address only those withdrawal revocations and classification terminations initiated after January 1, 1981. This constituted 180,000,000 acres, or an area larger than the State of Texas.

The sufficiency of the administrative process accompanying the Withdrawal Review Program is the issue raised by Respondent's complaint. In reviewing the issue presented, this Honorable Court should be aware that each one of the more than 814 agency actions challenged in this case was preceded by its own administrative decision-making process. *See* App. 11 at n.12. Each revocation of a land withdrawal or termination of a land classification was announced in the *Federal Register.*

For example, the individual parcel of land near Lander, Wyoming, that is the situs of the injury alleged for Respondent's standing was opened to mining only after a thorough administrative process. The BLM sought extensive public participation and conducted complete environmental review and planning, including environmental review pursuant to the National Environmental Policy Act of 1969. App. 11 at n.12.[6] Environmental

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[6] After the District Court received evidence on the procedures that were conducted in the area where the Respondent claims injury for standing in this case, the Court made the following statement:

> The Kelly Affidavit sets forth in great detail the voluminous process started in 1977 and concluded in 1984 that the BLM office in Lander, Wyoming followed in reaching its decision to terminate Classification No. W-6228. It completely answers plaintiff's claims of inadequate land use plans, lack of conformance determinations and insufficient opportunities for public participation.

National Wildlife Federation v. Burford, NO. 85-2238, Memorandum Opinion at 10-11, n.12 (November 4, 1988), App. 11.

groups and others had ample opportunity to be heard – and they were heard – in the agencies' decision-making process before individual actions were undertaken, or proposed to be undertaken following the elimination of unnecessary withdrawals and classifications. *See Id.*

This Honorable Court should also note that the intent of the Withdrawal Review Program is not to terminate "environmentally protective" withdrawals and classifications. The only "protection" intended by the withdrawals and classifications is from conflicts in land use that no longer exist. Any environmental protection provided by the withdrawals and classifications is incidental at best. For example, a dam site or a bombing range withdrawal may prevent mining, but these withdrawals can hardly be classified as "environmentally protective." Probably the greatest bulk of the withdrawals and classifications was for such things as sale to the public or pathways for cattle drives.[7] Obviously, these withdrawals and classifications provided no "environmental protection."

Proceedings in This Case

On July 15, 1985, the Respondent brought suit against the government to enjoin the withdrawal Review Program. Petitioners intervened in the District Court to protect the interests of their members who are individuals, businesses, and other organizations who had acquired interests in areas of revoked withdrawals or terminated classifications. On December 4, 1985, the District Court issued a preliminary injunction precluding any activity that was originally

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[7] This last use accounts for a large number of revocations.

prohibited on any of the 180,000,000 acres of withdrawal revocations and classification terminations made after January 1, 1981. The Court enjoined approximately 814 past agency actions along with all similar future actions. The parcel of land near Lander, Wyoming, upon which the Respondent asserts its standing, was just one of the 814 areas on which activities were enjoined.

Approval of mining plans, which are of particular interest to the Petitioners, were enjoined. Also enjoined were such actions as removal of a dam site withdrawal in the Grand Canyon, consolidation of land in wilderness areas, acquisition of private inholdings in wildlife refuges, and a land exchange involving the Nature Conservancy. Numerous other environmentally beneficial actions were enjoined as well. The injury complained of by Respondent to gain standing – primarily the opening of land to mineral exploration under the General Mining Law of 1872 – involved only 13,000,0000[8] acres of the 180,000,000 acres enjoined by the suit, or about seven percent of the total acreage. *See* App. 19.

Once the sweeping injunction was in place, the Respondent assumed the role of *de facto* federal land manager. I[illegible] at least one instance, the Respondent sought to exclude a parcel of land from the suit. The proponent

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[8] 13,000,000 acres of the land area opened to entry for mining under the General Mining Law of 1872, 30 U.S.C. § 22 (1982). The actual area disturbed by mining is only a few hundred acres. It is unknown whether there are mining impacts on the 8,000,000 acres of mineral leases involved in this case or whether these acres overlap with the 13,000,000 acres opened to the Mining Law.

of a land exchange which had been blocked by the injunction contacted the Respondent; and, after investigation, the Respondent's staff determined that the revocation benefited rather than hurt its interest. It then filed a motion with the court to allow the revocation on that one parcel to proceed.[9]

The suit presented an untenable situation for the Petitioners' members who must be able to rely on the certainty of federal permits and federal title for activities upon or rights to public land. Petitioners' members, who hold mining claims and mineral leases, after completing every necessary environmental and public participation procedure at the local level, were now faced with the prospect of losing all of their rights because of an alleged flaw in a national program.

The Petitioners presented the foregoing facts and following arguments in defense of the Respondent's appeal to the District of Columbia Court of Appeals. The Court of Appeals dismissed the arguments as being without merit and declined to consider the legal arguments presented below. App. 28-29, n.10. The Court of Appeals held that the one alleged injury caused by a classification termination near Lander, Wyoming – which the Respondent failed to challenge during the lengthy environmental review process that preceded the classification termination – was sufficient to establish standing to challenge the entire program. App. 32. Thus the Court of Appeals held that the Respondent, having foregone its earlier opportunity for a focused challenge to a specific proposed

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[9] *National Wildlife Federation v. Burford*, No. 85-2238 (NWF Motion for Voluntary Dismissal, filed April 11, 1986).

federal action, was now free to attack the broad general purpose, statutorily mandated, government program under which the specific action was taken.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S LONG ESTABLISHED RULE THAT PROGRAMS ARE NOT JUSTICIABLE

A. Only Agency Actions, Not Programs, Are Justiciable

The decision of the District of Columbia Court of Appeals conflicts with a long established rule of this Honorable Court that programs are not justiciable. In *Ashwander v. TVA*, 297 U.S. 288 (1936), this Honorable Court addressed a challenge to an individual agency action and to the program under which the action was taken. While the challenge to the single agency action – a TVA contract – was allowed, the challenge to the program under which the contract was authorized was not. This Honorable Court found that the program being challenged "did not give rise to a justiciable controversy save as [it] had fruition in action of a definite and concrete character." *Id.* at 324.

This Honorable Court has more recently addressed the subject of challenges to agency programs in *Allen v. Wright*, 468 U.S. 737 (1984). In *Allen*, this Honorable Court used the "fairly traceable" element of standing in its reasoning. The Court discussed the issues as follows:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury 'fairly can be traced to the challenged action' of the IRS. . . . That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal court adjudication.

Id. at 759-60. This statement from *Allen* presents the same issue as in the case at bar and answers that issue with the general rule that there is no standing for suits challenging programs.

In the present case, apparently the Respondent has completely foregone its opportunity to challenge the individual actions taken under the Withdrawal Review Program. In fact, the Respondent had ample opportunity to participate in the individual agency decision from which it now claims injury – that is the decision near Lander, Wyoming. *See* App. 11 at n.12. Each of the 814 agency actions caught in the web of this programmatic challenge was accompanied by an administrative process. If the Respondent had been diligent, then it could have challenged the individual agency actions thereby seeking and receiving any remedy it was due.

By allowing the Respondent to challenge a general purpose government program where only a small part of that program allegedly causes injury, the Court of Appeals allows Respondent a perverse economy of scale. In the process, the Court of Appeals does serious harm to

the government's ability to create rational and reliable programs. In the most extreme cases, like the case at bar, the process adopted by the Court of Appeals can allow a private organization to usurp federal land management authority. Moreover, and more importantly to the Petitioners, it seriously injures those who rely on a federal program and who must deal with the consequent irrationality or usurpation of authority.

B. This Case Does Not Fall into the Narrow Exception That Allows for Justiciablity of Programs That Are Like Single Agency Actions

A few court of appeals cases have addressed the issue of challenges to agency programs, and where the facts showed that the program had the characteristics of a single agency action, they have allowed standing. Unlike the Court of Appeals in the present case, each court considered the justiciablity rule of *Ashwander* or a derivation of that rule. Where standing was allowed, it was because the program in question had the character of a single government action.

In *Scientist Institute for Public Information, Inc. v. Atomic Energy Comm'n (SIPI)*, 481 F.2d 1079 (D.C. Cir. 1973), the District of Columbia Court of Appeals addressed a challenge to the Atomic Energy Commission's liquid metal cooled fast breeder reactor (LMFBR) program. The court considered and quoted *Ashwander*. It also considered that the LMFBR program would result in construction of a reactor demonstration facility. The court concluded that the LMFBR program was of sufficient

"definite and concrete character" to overcome the *Ashwander* preclusion on challenges to government programs.

Another case, *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), *rev'd on other grounds sub nom, Kleppe v. Sierra Club*, 427 U.S. 390 (1976), followed *SIPI*. That case addressed coal leasing covered by the Northern Great Plains Resources Program. In order to find the case justiciable, the court required the plaintiff to allege a reasonable basis for treating the coal leases cumulatively. In essence, the plaintiff was required to show the character of a single impact – similar to a single agency action.

The logic of a limited exception to the rule that programs of an agency are not justiciable is apparent. The government should not be allowed to accomplish its ends out of sight of judicial review by calling an agency action a "program." That has not happened in the present case. The Withdrawal Review Program serves a multitude of divergent, and some would argue, conflicting interests. Moreover, the distinction between the Withdrawal Review Program and the individual revocation actions taken under the program is clear. Each action had its own decision-making process, involved separate environmental issues and studies, and had its own *Federal Register* notice with opportunity for everyone, including the Respondent, to appeal or bring suit.

The case at bar bears none of the key characteristics of *SIPI* or *Sierra Club v. Morton*. The program will not result in a single facility as in *SIPI*, but will have thousands of very different and diverse results. It will not result in clear cumulative impacts as in *Sierra Club v.*

Morton, but will result in impacts that offset each other. It would be an exercise in futility for the government to add up the cumulative impact of such things as mining, creation of wildlife refuges, removal of dam sites and bombing ranges, removal of pathways for cattle drives, and innumerable other uses in locations from Florida to Alaska. There is no way to define one impact.

There is simply no rational way to view the Withdrawal Review Program as being like a single action. For that reason the exception of *SIPI* does not apply and the rule of *Ashwander* precludes standing or justiciablity. The decision of the Court of Appeals is in conflict with this Honorable Court's rule precluding justiciability of government programs.

II. THE COURT OF APPEALS' DECISION WILL HAVE A DEVASTATING IMPACT ON ANYONE WHO RELIES ON A GOVERNMENT PROGRAM

By allowing challenges to agency programs, the Court of Appeals opens the door to lawsuits capable of disrupting large portions of the government. Individuals or companies who must acquire government permits – such as the Petitioners' members – may lose their permits or property in public policy litigation. As this Honorable Court stated in *Allen v. Wright*, 468 U.S. 737, 760 (1984), such broad issues are the province of Congress, not the courts.

The case at bar presents a classic example of the importance of the issue to be reviewed. The effect of the decision of the Court of Appeals is to throw the titles to

7,000 mining claims and 1,000 mineral leases on the public lands into doubt. Numerous other property interests – perhaps thousands of interests – are impacted as well. Any use of the 180,000,000 acres of public land at issue is placed in doubt.

The Court of Appeals' decision has raised the specter that the withdrawal revocations and classification terminations may be void for procedural failures. One result of this could be that all title acquired subsequent to the revocation or termination may be void *ab initio*. The decision has put a cloud on title that is all but impossible for the best landman to find. It has threatened millions of dollars of investments made on the assumption that title in the land was secure.

The members of the Foundation and the Minerals Exploration Coalition established their mineral title by following the Mining Law of 1872, 30 U.S.C. § 22 (1982), and the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982). Prior to acquiring their interests, those represented by the Petitioners checked to see that the land where they established their interest was properly open to entry. Many of them had participated – along with environmental groups – in the extensive public process that led to the revocation of many of the withdrawals and classifications.

The record shows that extensive planning, public participation, and environmental procedure accompanied the decision to revoke withdrawals. *See* App. 11 at n.12. There was simply no way for the potential claimants or lessees to tell that there might be a title defect in the

Washington, D.C., records and structure of an agency program.

It is fundamentally unjust for the Respondent in this action to attack title by attacking the program when it could have objected to individual revocations in the local area at the time they were made. If the Respondent had made its objections in appeals to specific actions at the local level, then the title defect would be evident to the claimants and lessees. As it is, there is no way to tell that title might not be secure.

Moreover, because the suit involves the Washington records of an agency program, there is no way to tell what, if any, environmental values are really at stake. If the Respondent had chosen to challenge the individual agency actions that adversely impacted it, then proceedings could have addressed real environmental issues and given the claimants and lessees fair notice of a dispute. The sweeping programmatic challenge allowed by the Court of Appeals allows neither careful consideration of any environmental issues – which were addressed earlier with each specific agency action – nor fair notice of a dispute to claimants and lessees.

The decision of the Court of Appeals has created a fundamental injustice to the claimants and lessees. The precedent of that injustice will cause damage to everyone who relies on a government program. The decision of the Court of Appeals has significant potential for disruption of government programs and therefore must be reversed.

CONCLUSION

The Respondent in this case has sued to set aside the Withdrawal Review Program, a program that serves the general administrative purposes of the federal government. To allow lawsuits challenging, not specifically identifiable government actions, but government programs, will cause serious disruption of the federal government. That disruption will in turn cause serious harm to everyone who relies on government programs.

Because the rule set down by this Honorable Court preclude justiciablity of challenges to government programs and limit challenges to single agency actions, the Petition for Certiorari should be granted and the standing of the Respondent in this case should be denied.

Respectfully submitted,

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October, 1989.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff,	)	Civil Action No. 85-2238
v.	)	Filed
ROBERT F. BURFORD, *et al.*, Defendants.	)	Nov 04, 1988

MEMORANDUM OPINION

This case, which concerns the status of approximately 180 million acres of public land, was first filed on July 15, 1985, more than three years ago. A brief summary of the ensuing proceedings is appropriate.

On December 4, 1985, this Court granted plaintiff's motion for a preliminary injunction enjoining any new withdrawal revocations and classification terminations, as well as any activities inconsistent with previous withdrawals and terminations. *National Wildlife Federation v. Burford*, 676 F. Supp. 271 (D.D.C. 1985). At the same time we denied plaintiff's motion to dismiss. On February 10, 1986, pursuant to the defendants' motion to clarify, the previous injunction of December 4, 1985 was modified to make it clear that it reached only the federal defendants, not the activities of absent third parties, and was not intended "to overturn or in any way to upset fee interests."[1]

[1] The December 4, 1985 Order was subsequently amended on November 26, 1986, January 6, 1987, and April 11, 1988 to further limit its reach.

National Wildlife Federation v. Burford, 676 F. Supp. 280, 284 (D.D.C. 1986).

On December 11, 1987, the Court of Appeals for this Circuit in a lengthy split opinion (Judge Williams dissenting), affirmed this court's grant of preliminary relief. *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (*"Burford"*). It first addressed certain preliminary matters such as the challenge to plaintiff's standing, the effect on absent third parties, plaintiff's failure to exhaust its administrative remedies, and laches. *Burford*, 835 F.2d at 310-18. Passing to the merits, the Court held that the plaintiff had met the conventional criteria for the grant of preliminary relief and sustained the injunction. It conceded that it was a "close case" but held that this court did not abuse its discretion in holding that the plaintiff has shown a likelihood of success on the merits. *Id.* at 319, 327.

On April 29, 1988, in a brief slip opinion, the Appellate Court denied defendants' petition for a rehearing. *National Wildlife Federation v. Burford*, Nos. 86-5239, 86-5240, slip op. (D.C. Cir. April 29, 1988) (*per curiam*). It noted the seriousness of the case and its belief that "some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force." *Id.* at 1. Commenting on the far-reaching effect of this court's action in placing the status of vast tracts of land on "hold" and the confusion arising from this unsettled state of affairs, it expressed its belief "that the disposition of these million of acres should not continue to rest any longer than necessary on the foundation

of a preliminary injunction which was entered *on consideration of the brief affidavits and cursory materials presented to the court below.*" *Id.* (emphasis supplied). We were directed to proceed with this litigation "with dispatch." *Id.* This admonition was repeated by the Court of Appeals as recently as November 1, 1988, when it denied the defendants' emergency motion for a stay pending appeal. *National Wildlife Federation v. Burford*, No. 88-5291, slip op. (D.C. Cir. Nov. 1, 1988) (*per curiam*).

Present Posture

At issue is plaintiff's application for a permanent injunction. Pending before the Court are the motion of the defendants to dismiss and motions for summary judgment submitted by both parties. The matter has been extensively briefed.[2] Argument was held on July 22, 1988, at the conclusion of which the parties were directed to submit additional memoranda on the issue of plaintiff's

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[2] Defendants' motion for summary judgment filed September 12, 1986 is 86 pages in length and is accompanied by four declarations of Vincent J. Hecker, Chief, Division of Lands of the Bureau of Land Management (BLM), and the separate declarations of G. William Lamb, District Manager of BLM's Arizona Strip District, Ben Collins, District Manager of BLM's Las Vegas District Office, Ed Hastey, Director of BLM's California State Office, Jack Kelly, Manager of BLM's Lander, Wyoming Resource Area, and David C. Williams, Chief of BLM's Division of Planning and Environmental Coordination (BLM), as well as voluminous exhibits. Plaintiff's motion, as well as its responses to defendants' motion to dismiss and motion for summary judgment together with exhibits, are also extensive.

standing to bring this suit. Transcript of July 22, 1988 at 91-2. All parties have responded.[3]

Standing

In its opinion the Court of Appeals, after applying the "injury in fact" analysis required by Section 702 of the Administrative Procedure Act, concluded that based on the allegations of the complaint, "the Federation has alleged facts sufficient to establish injury in fact to its members." *Burford*, 835 F.2d at 312. In so doing, it pointed out that it has to assume that the allegations of the complaint were true and must be construed in the light most favorable to the organization. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). More importantly, the issue of standing arose in the posture of defendant's motion to dismiss, which affected the degree of factual specificity required to be shown in order to establish the likelihood of personal injury to plaintiff's members. This distinction was emphasized in *SCRAP*,[4] where a suit alleging injury to members based on their use and enjoyment of natural resources was held by the Supreme Court sufficient to survive a motion to dismiss. At the same time, the highest Court acknowledged that, on a motion for summary judgment, the plaintiff might have to show

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[3] Plaintiff, in addition to its memorandum filed August 22, 1988 has submitted additional evidentiary material, including declarations from four of its members. These submissions are untimely and in violation of our Order. We decline to consider them. *See Federal Defendants' Reply to Plaintiff's Statement of Points and Authorities in Support of Its Standing to Proceed, at 1 n.1.*

[4] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

injury with greater specificity. *See SCRAP*, 412 U.S. at 689 & n.15. Our Court of Appeals has more recently spelled out the importance of this distinction. *See Wilderness Society v. Griles*, 824 F.2d 4, 16-17 (D.C. Cir 1987) (Plaintiff's failure to show specificity of injury in response to defendant's motion for summary judgment precludes their standing, but case was reversed to permit plaintiff an opportunity for further discovery on this issue).[5] The Court's affirmance of standing in the instant case must therefore be read in the context of the procedural posture of the case when that Court considered this issue. The dissenting opinion, while observing that "[a]t this point in the proceeding the issue of standing is largely academic" and that "the defendants appear to have conceded the bare minimum necessary for standing," emphasized that the "specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment." *Burford*, 835 F.2d at 327-28 (Williams, J., concurring and dissenting). This is because plaintiff's burden of showing likelihood of success of the merits presupposes a preliminary finding that plaintiff has standing. *See id.* at 328. In light of the foregoing, we turn now to reconsider our earlier finding that plaintiff has standing to pursue this litigation. Plaintiff predicates

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[5] The *Wilderness Society* litigation was terminated on October 31, 1988 through the entry of the "Stipulation of All Parties for Dismissal." The issues in that case were held to be mooted by the passage by Congress on August 16, 1988 of Pub. L. No. 300-395.

its claim of standing on two types of injury, informational or procedural injury to it as an organization and environmental harm to its members, both caused by defendants' administration of the Land Withdrawal Review Program.[6] Plaintiff's Memorandum in Support of Standing at 2.

Admittedly, the decisions on standing are not a model of consistency. However, it is generally agreed that, in order to satisfy the "case or controversy" requirement of the Constitution and Section 702 of the Administrative Procedure Act, the plaintiff must both plead and prove that it or its members have suffered some actual or threatened injury as the result of defendants' allegedly unlawful conduct. These requirements have been summarized by the Supreme Court in *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 472 (1982), as follows:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

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[6] This program concerns the termination of land classifications and the revocation of land withdrawals.

It is not disputed that an organization may have standing to bring suit on behalf of its members.[7] Plaintiff's claim of injury to it as an organization rests upon its alleged inability 1) to obtain information as to the federal defendants' Land Withdrawal Review Program and the actions completed under such program, and 2) to participate in the federal defendants' decision making. It claims that it, as an organization, is entitled "to see and use" the kind of information that would have been available had the federal defendants completed environmental impact statements. Plaintiff's Statement in Support of Standing at 2-3. In sole support of this position, plaintiff has submitted the declaration of Lynn Greenwall, its Vice President for Resources Conservation. An analysis of the Greenwall declaration shows, after a description of the plaintiff's organization and the nature and size of its membership, the plaintiff's educational program to inform its members concerning conservation issues and their financial support for this purpose, a bare claim that plaintiff's ability to meet the obligations to its members

> has been significantly impaired by the failure of the Bureau of Land Management and the Department of Interior to provide adequate information and public participation with respect to the Land Withdrawal Review Program.

Plaintiff's Statement in Support of Standing at 5.

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[7] To do so, it must meet the three-prong test for representational standing set forth by the Supreme Court. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). One of these requirements is that one or more of the organization's members has himself standing to sue.

It is apparent on its face that the Greenwall declaration is conclusory and completely devoid of specific facts. Plaintiff has the burden of proof on this issue and has failed to make a showing as to the existence of the elements essential to its case, *i.e.*, its lack of adequate information and opportunity for public participation. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). It has not done so. Its claim of informational and procedural injury to it as an organization is therefore without merit and provides no basis to support its claim of standing.[8]

Plaintiff's other claim of injury concerns alleged environmental harm to its members. Defendants do not challenge that fact that injury to the environment can support a claim of member standing, but rather they focus their attack on the particular showing of injury made in this case. Some useful guidelines have been set forth in *Wilderness Society*, 824 F.2d 4. Both *Wilderness Society* and the instant case concern vast tracts of land[9]

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[8] Although not required to do so, because defendants did not have the burden to disprove plaintiff's conclusory contention, defendants have advised plaintiff of the environmental documentation and the methodology employed and have made its extensive files containing such information available for the plaintiff's inspection. The fact that no individual environmental impact statements were done in individual classifications or withdrawal terminations adds nothing to plaintiff's claim of injury.

[9] *Wilderness Society* involved the selection by the State of Alaska of 100 million acres of federal land and Department of Interior's change of policy to exclude submerged lands from the total acreage to be conveyed to Alaska. *See Wilderness Society*, 824 F.2d at 7.

and do not involve allegations by a plaintiff that governmental action will be taken against it. Rather, they both concern conduct of a third party whose possible response will injury plaintiff. As was said in *Wilderness Society:*

> The standing question in these three-party cases frequently turns not on the issue of personal injury but rather on so-called causation issues, *i.e.*, whether the third-party's decision is sufficiently dependent upon governmental action that the plaintiff's injury is "fairly traceable" to the action and is "likely to be redressed" by an order binding the government. . . .[citing *Allen v. Wright*, 468 U.S. 737 (1984) and other cases] When personal injury is at issue in a three-party case, it usually depends upon how likely it is that the third-party's response to the challenged governmental action will injure the plaintiff *at all.*

824 F.2d at 11 (citations omitted).

The Court in *Wilderness Society* concluded its discussion of this problem with the following language which is particularly relevant to the facts of the instant litigation:

> To sum up, whether an allegation of threatened injury suffices for standing turns on the likelihood of the occurrences of that injury. . . . [T]he court must ascertain whether the third party's response to governmental action will . . . affect the plaintiff's intended behavior. Where the alleged injury involves access to land in a three party case, as in *Sierra Club, SCRAP,* and the case at bar, the judgment regarding the likelihood of injury turns on *whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action.* Otherwise, the threat of injury would be too amorphous or uncertain; it would be no

> greater for the plaintiff than for any person simply opposed to the governmental action in question. In short, the issue in each case is whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action.

Wilderness Society, 824 F.2d at 12 (emphasis supplied).

Plaintiff rests its entire claim of standing to sue for environmental injury on the affidavits of two persons, *i.e.*, Peggy Peterson and Richard Erman. Both of their brief affidavits were filed on May 22, 1986.[10] Neither appears to be referred to in plaintiff's Motion for Summary Judgment filed on June 23, 1986, which does not consider the question of plaintiff's standing.

The Peterson affidavit claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment and that her recreational aesthetic enjoyment has been and continues to be adversely affected as the result of the decision of BLM to open it to the staking of mining claims and oil and gas leasing. Peterson Affidavit, filed May 22, 1986. This decision[11] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and

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[10] They are 3 and 3-1/2 page in length, respectively, and use the same boiler plate language and format.

[11] Termination of Classification No. W-6228 referred to in Federal Defendants' Motion for Summary Judgment, Statement of Facts at 6.

mining. *See* Kelly Affidavit attached to Federal Defendant's Motion for Summary Judgment filed September 4, 1986.[12] There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination. All she claims is that she uses lands "in the vicinity." The affidavit on its face contains only a bare allegation of injury, and fails to show specific facts supporting the affiant's allegation.

The Erman Affidavit is similarly flawed. Erman asserts that he uses federal lands, including those in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest for recreational purposes and for aesthetic enjoyment. He further asserts that his recreational use and aesthetic enjoyment of federal lands, particularly those *in the vicinity* of the Grand Canyon National Park and the Arizona Strip have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department, with particular reference to the opening to the staking of mining claims and the failure of the Bureau and the Department to provide notice of their proposals to terminate classifications and other withdrawals and to provide opportunities for the public

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[12] The Kelly Affidavit sets forth in great detail the voluminous process started in 1977 and concluded in 1984 that the BLM office in Lander, Wyoming followed in reaching its decision to terminate Classification No. W-6228. It completely answers plaintiff's claims of inadequate land use plans, lack of conformance determination and insufficient opportunities for public participation.

involvement. Erman Affidavit filed May 22, 1986. The magnitude of Erman's claimed injury stretches the imagination. As the affidavit of J. William Lamb shows, the Arizona Strip consists of all lands in Arizona north and west of the Colorado River on approximately 5.5 million acres, an area one-eighth the size of the State of Arizona. Furthermore, virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining. The revocation of withdrawal concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining. *See* Lamb Affidavit, attached to Federal Defendant's Motion for Judgment.[13]

Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show "injury in fact" with respect to the two specific areas in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawals revocations. It should be noted that plaintiff's claims of injury reach hundreds of decision affecting 180 million acres spread over seventeen states. Since plaintiff lacks standing in the constitutional sense or as

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[13] The Lamb Affidavit also details the history of the several withdrawals and classifications placed on the public lands comprising the Arizona Strip. These commenced in 1930 and were terminated in 1981 after the passage of the Federal Land Policy and Management Act, 43 U.S.C. § 1701, *et seq.*

an "aggrieved party" under Section 702 of the APA, we lack subject matter jurisdiction and dismiss for lack of standing.

Merits

In view of the position taken that this Court lacks jurisdiction for lack of standing, it is not necessary that we reach the merits of plaintiff's claim for injunctive relief. The dissenting opinion of the Court of Appeals has mirrored many of these problems in its discussion of our grant of preliminary injunction presented as it was in response to defendant's motion to dismiss.

An Order consistent with the foregoing has been entered this day.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

Date: 4 Nov. 88

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff,	)	Civil Action No. 85-2238
v.	)	Filed
ROBERT F. BURFORD, *et al.*, Defendants.	)	Nov 04, 1988

ORDER

Upon consideration of the parties' respective motions for summary judgment and oppositions thereto, the hearing thereon held July 22, 1988, and the parties' subsequent submissions on the issue of plaintiff's standing, it is by the Court this 4th day of November, 1988

ORDERED that this Court's grant of a preliminary injunction be vacated, and it is

ORDERED that Defendants' Motion for Summary Judgment be granted; and it is

FURTHER ORDERED that the above action shall stand dismissed for lack of standing.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 21, 1989 Decided June 20, 1989

No. 88-5397

NATIONAL WILDLIFE FEDERATION, APPELLANT

v.

ROBERT F. BURFORD, et al.

No. 88-5291

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, et al.

ASARCO INCORPORATED, APPLICANT
FOR INTERVENTION,
APPELLANT

Appeals from the United States District Court for the District of Columbia

(Civil Action No. 85-02238)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Eldon V.C. Greenberg, with whom *Kathleen C. Zimmerman* and *Norman L. Dean, Jr.* were on the brief, for appellant in No. 88-5397.

Jacques Gelin, Attorney, Department of Justice, with whom *Donald A. Carr*, Acting Assistant Attorney General, *Robert L. Klarquist and Fred R. Disheroon*, Attorneys, Department of Justice, were on the brief, for appellees in No. 88-5397.

Jerry L. Haggard, of the bar of Arizona, pro hac vice, by special leave of Court, with whom *Nancy C. Shea* and *H. Barry Holt* were on the brief, for appellants in No. 88-5291.

Kathleen C. Zimmerman, for appellee in No. 88-5291.

Eric Twelker also entered an appearance for appellees, in No. 88-5397.

Bruce J. Ennis, David W. Ogden and *David A. Handzo* were on the brief of amicus curiae The Wilderness Society urging reversal, in No. 88-5397.

Before: EDWARDS and RUTH B. GINSBERG, *Circuit Judges*, and KAUFMAN,* *Senior Judge*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* In July 1985, appellant National Wildlife Federation ("NWF" or "Federation"), a

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*Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

nonprofit natural resources conservation and education association with over 4.5 million members, brought suit to challenge a Department of Interior ("Interior" or "Department") decision to reclassify the status of approximately 180 million acres of public land. The present appeals involve two decisions arising out of NWF's suit. First, on November 4, 1988 – after extended preliminary proceedings, including the issuance of a preliminary injunction enjoining Interior's challenged activity, which was upheld by this court in *National Wildlife Federation v. Burford, ("Burford I")*, 835 F.2d 305 (D.C. Cir. 1987), and various actions by the trial court amending the original injunction – the District Court granted Interior's motion for summary judgment on the ground that NWF lacked standing. NWF now appeals from that decision. Second, ASARCO, Inc. ("ASARCOA"), a producer of nonferrous metals, appeals the District Court's denial of its motion to intervene. The District Court so ruled because it found ASARCO's motion to be untimely filed.[1]

On the first appeal, No 88-5397, we adhere to the holding of the court in *Burford I* that NWF "has alleged injury in fact sufficient to establish standing to pursue its . . . claims against the Department," 835 F.2d at 314, and we conclude that the record before us is more than adequate to allow NWF to survive a motion for summary

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[1] These cases were argued separately before this court. NWF's appeal was docketed as case No. 88-5397, and ASARCO's as No. 88-5291. We have consolidated the two cases for decision because of the unity of the substantive issues underlying these procedural appeals.

judgment on standing. Therefore, we reverse the judgment of the District Court and remand for a determination on the merits.[2]

On the second appeal, No. 88-5291, we reverse the District Court's denial of ASARCO's motion to intervene with respect to one of ASARCO's claims, because we find that the motion was timely filed. We remand this portion of the case to the District Court to allow it to consider whether ASARCO's intervention is presently warranted.

I. BACKGROUND

A. *Standing of the National Wildlife Federation*

NWF filed suit under the Federal Land Policy and Management act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.* (1982); the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* (1982); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* (1982), challenging Interior's ongoing "Land Withdrawal Review Program" ("Program"). The Program primarily involves the termination of land "withdrawals" and "classifications," the two main vehicles through which Interior establishes and implements land use planning for millions of acres of federal public lands. "Classifications" allow Interior to categorize lands for specific usage, and frequently designate public lands for retention, thereby segregating them from the scope of various land disposal laws. "Withdrawals" directly remove designated public

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[2] We find it unnecessary to reinstate the preliminary injunction because the case should now proceed directly to the merits.

lands from disposal under the general land laws. The Program is implemented by the Bureau of Land Management ("BLM"), a subagency of Interior.

Pursuant to the Program, the Department, relying on its authority under the FLPMA,[3] lifted protective restrictions from nearly 180 million acres of federal land located in seventeen states. According to the Assistant Director of Land Resources for the BLM, over thirteen million acres of public lands that previously were closed to some or all types of mining are now open to be mined by private parties as a result of these classification and withdrawal terminations, *see* Affidavits of BLM Assistant Director Frank Edwards, Joint Appendix ("J.A.") 75, 102-03, and another eight million acres are now open for mineral leasing, *Burford I*, 835 F.2d at 324-25. Hundreds of leases and sales have already been effectuated or are pending for mining, mineral leasing, agricultural, commercial, and other proposed developmental uses. *See id.*

NWF filed suit challenging the Program on July 15, 1985, simultaneously moving for preliminary injunctive relief. On December 4, 1985, the District Court granted NWF's motion for a preliminary injunction, enjoining Interior from issuing any "withdrawal revocations" or "classification terminations" and from engaging in any

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[3] Until enactment of the FLPMA, terminations of classifications and withdrawals could be effected only by the President. However, in 1976, Congress enacted FLPMA § 202(d), 43 U.S.C. § 1712(d) (1982), which authorized the BLM to modify or terminate its previous classifications and withdrawals. The Program was thus enacted pursuant to the FLPMA and is subject to that statute's other substantive management criteria. *See, e.g., id.* §§ 1701, 1712, 1714.

activities inconsistent with extant withdrawals and terminations. *National Wildlife Federation v. Burford*, 676 F.Supp. 271 (D.D.C. 1985).[4]

On December 11, 1987, a panel of this court affirmed the District Court's grant of preliminary relief. *See Burford I supra*. This court first addressed preliminary matters such as standing, the effect on absent third parties, and exhaustion, *see* 835 F.2d at 310-18, and concluded "that the Federation has alleged facts that demonstrate that the actions of the Department threaten to harm the cognizable interests of the Federation's members. Consequently, we find that the Federation has alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims against the Department." *Id.* at 314. Passing to the merits, the court in *Burford I* held that the Federation had satisfied the burden of proof necessary to sustain a preliminary injunction. Conceding that this was a "close" case, *id.* at 319, the court nevertheless held that the District Court has not abused its discretion in finding the NWF had shown a likelihood of success on the merits, *see id.* at 327.[5]

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[4] On February 10, 1986, pursuant to the defendants' motion to clarify, the District Court modified the injunction to make clear that it reached only the federal defendants and not absent third parties, and that it was not intended "to overturn or in any way to upset fee interests." *National Wildlife Federation v. Burford*, 676 F. Supp. 280, 284 (D.D.C. 1986). The original injunction was subsequently amended three more times prior to this appeal to further limit the reach of the injunction.

[5] Subsequently, in the course of denying another motion, a panel of this court exhorted the District Court to proceed with the litigation "with dispatch" because millions of acres of land

(Continued on following page)

Following this court's remand in *Burford I*, and during subsequent pre-trial proceedings before the District Court, NWF complained of the same specific injury from the Program's reclassifications that it had cited in its motion for the preliminary injunction. First, NWF claimed that its many members who "use and enjoy the environmental resources that will be adversely affected by the challenged actions" would be deprived of such use by the development of these lands. Brief for Appellant NWF at 10. Second, NWF complained that the organization and its members had been injured by being denied "information on the potential impacts of defendants' actions" as well as "the opportunity to participate in defendants' decision-making." *Id.* In support of these complaints, NWF resubmitted to the trial court the affidavits of two of its members, Peggy K. Peterson, *see* J.A. 209, and Richard L. Erman, *see* J.A. 205, and the sworn declaration of its Vice-President for Resources Conservation, Lynn A. Greenwalt, *see* J.A. 212. Two of these same affidavits had been ruled sufficient to establish standing for the purposes of a preliminary injunction by both the District Court itself and by this court in *Burford I*.

Both sides moved for summary judgment; the matter was extensively briefed and oral argument was heard on the motions on July 22, 1988. After oral argument the District Court directed both sides to submit additional

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(Continued from previous page)

were "on hold" due to a preliminary injunction issued only on the basis of brief affidavits and other cursory materials, *see National Wildlife Federation v. Burford*, 844 F.2d 889, 890 (D.C.Cir. 1988) (per curiam).

memoranda by August 22, 1988, on the issue of NWF's standing to bring suit. Both parties complied with this order, but the trial court then declined to consider certain of the additional material submitted by the Federation. The court stated that it found these submissions, which included "declarations from four of its members," to be "evidentiary material," submitted "in addition to [NWF's] memorandum filed August 22, 1988." Because it found these submissions to be "untimely and in violation of our Order," it "decline[d] to consider them." *National Wildlife Federation v. Burford*, No. 85-2238 (D.D.C. Nov. 4, 1988), *reprinted in* J.A. 367, 370 n.3 [hereinafter "Memorandum Opinion"].

In the same Memorandum Opinion, issued on November 4, 1988, the District Court also dismissed the case for lack of standing and lifted the preliminary injunction. The court acknowledged that NWF had established standing in the prior proceedings before the court of appeals because "the issue of standing arose in the posture of defendant's motion to dismiss." Memorandum Opinion, J.A. 370. On a motion to dismiss, the trial court reasoned, an appellate court had to assume the complaint's allegations to be true and had to construe them in a light most favorable to the organization. *See id.* (citing *Burford I*, 835 F.2d at 312; *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The District Court opined that Supreme Court and subsequent D.C. Circuit precedent mandated that more specific injury-in-fact must be shown to sustain standing on a motion for summary judgment than to sustain standing on a motion to dismiss. *See* Memorandum Opinion, J.A. 370-71 (citing *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412

U.S. 669, 689 & n.15 (1973); *Wilderness Society v. Griles*, 824 F.2d 4, 16-17 (D.C. Cir. 1987). The trial court, however, failed to give due weight to the fact that the panel in *Burford I* held that NWF had established standing for purposes of a preliminary injunction, and not merely to survive a motion to dismiss.

Reconsidering its initial finding of standing in light of what it saw as this more demanding *SCRAP/Griles* standard, the trial court concluded that the affidavits submitted by NWF were insufficient evidence of injury-in-fact to sustain standing. The court rejected the affidavit of NWF Vice-President Greenwalt as "conclusory and completely devoid of specific facts." Memorandum Opinion, J.A. 374. Turning to the Peterson and Erman affidavits, the court noted that these presented the issue of so-called "third-party injury – that is, injury to the plaintiff that is caused by the future conduct of a third party (in this case, a mining company), in response to defendant's action, rather than by the direct action of the defendant. The court therefore defined the standing issue as "whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action." *Id.*, J.A. 375 (quoting *Griles*, 824 F.2d at 12). The trial court concluded that the Peterson and Erman affidavits were "vague, conclusory and lack[ed] [the] factual specificity. . . . [to] show 'injury in fact.'" *Id.*, J.A. 378. Specifically, the court found that, because Peterson claimed only that she uses lands "in the vicinity" of the South Pass-Green Mountain area of Wyoming for recreation, the affidavit was not specific enough to show that her use and enjoyment extended to the *particular* 4500

acres that would be affected by the challenged Department termination within the described two million acre area. The court found the Erman affidavit to be "similarly flawed" with respect to the Arizona lands it addressed. *See id.*, J.A. 377. This appeal followed.

B. *ASARCO's Motion to Intervene*

Under one classification that the Program terminated, 31,000 acres of federal land in central Oregon were withdrawn from private appropriation, including the location of mining claims. Pursuant to this classification termination, the BLM permitted ASARCO, whose business includes the exploration and development of mineral interests through mining claims on federal lands throughout the western United States, to stake mining claims on some of these lands from November 1987 through January 1988. These claims are known as the "Spanish Gulch" claims. However, because of the order of the District Court enjoining the post-1981 terminations, the BLM subsequently notified ASARCO by letter dated March 21, 1988, that its Spanish Gulch claims were null and void. The letter explained that as of February 10, 1986, and continuing until the injunction was lifted or modified, the BLM could not open the Spanish Gulch lands to private mining claims. *See* ASARCO Appendix ("A.A") 30-31.

On June 6, 1988, ASARCO moved to intervene as a defendant in the NWF action.[6] ASARCO maintained that the scope of NWF's complaint and the application of the

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[6] ASARCO also appealed the BLM's determination to the Interior Board of Land Appeals.

preliminary injunction did not extend to some interests in federal land, including ASARCO's Spanish Gulch claims.[7] Although ASARCO's motion to intervene was filed three years after the filing of NWF's original suit, and two-and-a-half years after the issuance of the District Court's preliminary injunction, it was filed less than three months after ASARCO was notified by Interior that its Spanish Gulch claims were directly affected by this litigation.

On July 22, 1988, the same day the District Court heard oral argument on the cross-motions for summary judgment in the outgoing NWF suit against the Government, the trial court also denied ASARCO's motion to intervene "into this longstanding litigation," stating that the motion was untimely under Rule 24 of the Federal Ruled of Civil Procedure.[8] *See National Wildlife Federation v. Burford*, No. 85-2238 (D.D.C. July 22, 1988), *reprinted in*

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[7] ASARCO based this argument on the fact that some land classifications, including the Spanish Gulch claims, had already terminated by operation of law well before 1981, under the now-expired Classification and Multiple Use Act of 1964, so that the preliminary injunction could not encompass these terminations.

[8] ASARCO sought a stay of the District Court's order pending its appeal. By order dated September 6, 1988, the District Court denied the stay, finding that ASARCO's then asserted interests were already adequately represented by existing parties to the litigation, that the motion to intervene was untimely, and that further postponement of the case "would be harmful to the parties and the public." *National Wildlife Federation v. Burford*, No. 85-2238, slip op. at 2 (D.D.C. Sept. 6, 1988).

A.A. 39. As noted above, the District Court subsequently dismissed the Federation's case for lack of standing and simultaneously dissolved the preliminary injunction from which ASARCO claimed injury. ASARCO appealed, subject to this court's disposition of NWF's appeal in the primary case.

II. ANALYSIS

A. *Standing of the National Wildlife Federation*

It is well settled that an organization may have standing to bring suit on behalf of its members. *See International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock ("UAW v. Brock")*, 477 U.S. 274, 281-90 (1986); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). In *Hunt*, the Supreme Court determined that an organization seeking to pursue members' claims in a representational capacity may do so if

> (a) [one or more of the organization's] members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343. *See also Burford I*, 835 F.2d at 311. At issue in the instant case is only the first of the *Hunt* factors; no one disputes that the last two requirements have been

met.[9] Thus, the crux of the standing issue on this case is whether Federation members would have standing to sue in their own right.

Article III of the Constitution limits the rights of individuals to seek judicial redress by extending the "judicial power" of the United States only to the resolution of "cases" and "controversies". U.S. CONST. art. III, § 2. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), the Supreme Court described the scope of these limitations as follows:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 411 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

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[9] To wit, first, NWF seeks to protect its members' interests in preserving the environmental resources that will be adversely affected by the Interior action. These interests are germane to NWF's purposes, which include natural resource preservation and conservation. Second, there is no reason to require individual Federation members to participate in this case. Courts have generally required individual participation only when there are conflicts of interest within an organization, *see, e.g., Harris v. McRae*, 448 U.S. 297, 320-21 (1980), or when individual participation in a suit is needed in order to make damage determinations, *see, e.g., Warth*, 422 U.S. at 515-16.

Of these three constitutional standing components – injury-in-fact, causation, and redressibility – the District Court in the case before us rested its denial of standing only on the first. It found that NWF had not demonstrated the requisite injury-in-fact, because NWF's affidavits did not evidence a particular showing of injury. We disagree and reverse this finding.[10]

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[10] Defendant-intervenor Mountain States Legal Foundation ("Mountain States") raises several other challenges to NWF's standing in addition to the injury-in-fact challenge. These involve the causation and redressibility requirements for constitutional standing, and the prudential "generalized grievance" limitation on standing – *i.e.*, that the injury must not be a generalized grievance about the conduct of government, since these are most appropriately addressed in the representative branches. *Warth*, 422 U.S. at 499-500; *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d at 1322, 1335 (D.C. Cir. 1986). We reject these other standing claims.

To begin with, there is no doubt that any injury alleged by NWF is caused by, and could be easily redressed by, the Department's modification of its plans under the Program. Mountain States argues that the injury to NWF members will not be caused directly by the Government but, rather, by mining and other development companies affected by regulations under the Program. Therefore, according to Mountain States, because NWF has not alleged facts sufficient to identify any adverse action that will be taken by these companies, plaintiff's injury is not "fairly traceable" to that action, nor is it "likely to be redressed" by an order binding the Government. It is understandable why neither the District Court in its decision below nor the Government on this appeal endorses Mountain States' position, for it is patently flawed.

Once the lands in dispute are removed from Government regulation or protection under the Program and made available

(Continued on following page)

1. *Injury-in-Fact*

NWF claims it is entitled to judicial review under section 10(a) of the APA, 5 U.S.C. § 702 (1982).[11] Injury-in-

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for private mining and other developmental uses, NWF will have no claim against those in control of the land development projects. Furthermore, to the extent that evidence regarding private developmental uses is relevant, it has already been addressed by this court in *Burford I*. Based on both the challenged NWF affidavits and the sworn statements of Government officials delineating the precise scope of pending third-party activity in response to the Program, this court specifically rejected the argument now advanced by Mountain States. *See Burford I*, 835 F.2d at 313-14, 324-25. The relevant portion of that opinion has not been called into question or resisted in any way by any litigant. The intervenor has offered no valid basis for reconsideration of our earlier rejection of this argument, and the Government has not even seen fit to raise the issue. Intervenor's position obviously lacks any merit, and we accordingly reject it.

Nor do we find any merit in the intervenor's claim that the Federation should be denied standing under the prudential "generalized grievance" principle. It is plain in this case that NWF has not based its claim on any generalized grievance about the Government's activities, but rather on the concrete injury to its members. The Supreme Court has "made it clear that standing is not to be denied simply because many people suffer the same injury." *SCRAP*, 412 U.S. at 687. As long as there is a "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S. 83, 102 (1968), plaintiffs will have met the "generalized grievance" criteria. We find that, on the facts of this case, NWF has alleged such a "logical nexus."

[11] Section 702 gives the right of judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

fact analysis under the APA mirrors that required by the Constitution. *See Community for Creative Non Violence v. Pierce*, 814 F.2d 663, 667 (D.C. Cir. 1987). This injury-in-fact requirement is satisfied by the presence of a "distinct and palpable injury." *Warth*, 422 U.S. at 501; *see also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C. Cir. 1986). The injury may result from invasion of a statutory right as well as a constitutional one, *see, e.g., Schelsinger v. Reservists Comm. to Stop The War*, 418 U.S. 208, 224 n.14 (1974); *Sierra Club v. Morton*, 405 U.S.727, 732 & n.3 (1972), but it must be more than merely "abstract" or "conjectural" to suffice, *Allen v. Wright*, 468 U.S. 737, 751 (1984). The injury need not be important or large; an "identifiable trifle" can meet the constitutional minimum. *SCRAP*, 412 U.S at 689 n.14. "And an injury shared by a large number of people is nonetheless an injury." *Center for Auto Safety*, 793 F.2d at 1331 (citing *Sierra Club*, 405 U.S. at 734).

Elaborating on the injury-in-fact standard, the *Burford I* court explained that "[t]he Federation must allege facts demonstrating a definable and discernible injury to its members and an adequate connection between that injury and the members. *See [SCRAP*, 412 U.S. at 688-89]. The personal injury may be 'actual or threatened.' [*Valley Forge*, 454 U.S. at 472]." 835 F.2d at 311. The *Burford I* court then analyzed "a pair of environmental lawsuits relevant to this case," *id.*, handed down by the Supreme Court that elaborate on the requirement in this context. In *Sierra Club*, the Court denied standing to the Sierra Club

on its allegation that the Government's decision to permit development of a quasi-wilderness national park would "destroy or . . . adversely affect" the natural resources in the park and would "impair . . . enjoyment . . . for future generations." 405 U.S. at 734. Although acknowledging that this was a cognizable injury, the Court nonetheless found that it did not amount to injury-in-fact sufficient to uphold standing because the Sierra Club had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 735. In contrast, the Court found in *SCRAP* that the plaintiff-organization had established standing to challenge an ICC rate increase. No doubt tailoring its complaint to conform with the decision in *Sierra Club*, the *SCRAP* plaintiffs had alleged that their members used "the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area" for various recreational and aesthetic purpose, and that these uses would be disturbed by a chain of third-party responses to the challenged agency action. *SCRAP*, 412 U.S. at 678. The *Burford I* court summarized the teachings of these cases as making "clear that in order to establish injury in fact for representational standing, an organization must allege facts showing that one or more of its members is among the persons injured by the challenged agency action." 835 F.2d at 311.

The affidavits submitted by the Federation in this case clearly alleged facts showing that its members were "among the persons injured" by Interior. Thus, we hold that in this case as pleaded on July 22, 1988, *i.e.*, at the time of the District Court's hearing on the cross-motions for summary judgment, NWF demonstrated sufficient

detail of injury-in-fact to survive a motion for summary judgment on standing grounds. In other words, even leaving aside the applicable law of the case established by this court in *Burford I*, *see* part II.A.2 *infra*, and the supplemental affidavits submitted by petitioners after the hearing on the motions for summary judgment, *see* Part II.A.3 *infra*, there was enough detail in support of standing to raise material issues of fact sufficient to require the trial judge to consider the case on the merits. In fact, the original Peterson affidavit alone raised "genuine issue[s] [of] material fact," FED. R. CIV. P. 56(c), with respect to the standing issue, enabling petitioners to survive a motion for summary judgment.[12]

Peterson's affidavit stated:

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and

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[12] As a preliminary matter, we note the District Court's finding that

> standing alone, the [Peterson and Erman] affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of *each* of the 1250 or so individual classification terminations and withdrawal revocations.

J.A. 378 (emphasis added). As we stated in *Burford I*, *see* 835 F.2d at 324, to the extent that this summarizes the trial court's reasoning, it reflects an erroneous application of law. The applicable law governing standing requires that plaintiffs be injured by only *one* of the terminations. *See UAW v. Brock*, 477 U.S. at 282-86; *Warth*, 422 U.S. at 511.

> the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

J.A. 210. The District Court found this statement not to be specific enough because the Interior

> decision [to open the South Pass-Green Mountain area of Wyoming to mining claims and oil and gas leasing] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. . . . There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification.

Memorandum Opinion, J.A. 376-77.

On the record of this case, the trial court's reasoning does not support the result reached. Interior planned to open to leasing all but 2000 of the remaining unleashed 6500 acres in a two million acre area. The language of Peterson's affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise, *her use* and enjoyment would not be "adversely affected" in any way. In other words, the universe of the land to which Peterson's affidavit refers can only encompass the 6500 acres that was not yet opened to mining and leasing claims. Of these 6500 acres, only 4500 are affected by the Program. If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. The District Court in no way questions

the *veracity* or *clarity* of the affidavit, only its *specificity*. Cf. SCRAP, 412 U.S. at 689 (court will not consider whether allegations in affidavits are untrue unless alleged by opposing party). But the trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

At a minimum, Peterson's affidavit is ambiguous regarding whether the adversely affected land are the ones she uses. When presented with ambiguity on a motion for summary judgment, a District Court must resolve any factual issues of controversy in favor of the non-moving party, even when the issue of harm and the issue on the merits are intertwined. *See Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 94 (D.C. Cir. 1986); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 810 (D.C. Cir. 1983); *accord National Wildlife Federation v. Snow*, 561 F.2d 227, 236-37 (D.C. Cir. 1976). This means that the District Court was obliged to resolve any factual ambiguity in favor of NWF, and would have had to assume, for the purposes of summary judgment, that Peterson used the 4500 affected acres. Accordingly, we find that Peterson has alleged injury-in-fact sufficient to give her standing to sue, and therefore that NWF also has standing under the *Hunt* criteria.[13]

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[13] Because we find the Peterson affidavit to be adequate support for the standing claim, it is unnecessary for us to decide whether the Erman and Greenwalt affidavits, both of which differ somewhat from Peterson's, are specific enough to merit standing. *See Sierra Club*, 405 U.S. at 740 n.15, ("The test

(Continued on following page)

2. *The Law of the Case*

Furthermore, and equally importantly, our decision on this appeal is precisely in accord with what another panel of this court found the first time this case was heard on appeal in *Burford I*. The *Burford I* court held that "the affidavits supplied by the Federation specifically identify locations where its members' interests are threatened by the Department's actions in lifting restrictions on mining and other forms of natural resource exploitation." 835 F.2d at 325. The affidavits referred to by the court are the *very same* ones that we now review; the *Burford I* court expressly held they provided adequate grounds for NWF to establish irreparable harm at the preliminary injunction stage. Even Judge Williams, concurring in part and dissenting in part from *Burford I*, agreed that the record established NWF's standing, albeit "minimally." 835 F.2d at 329-30. For another panel of this court subsequently to contradict this express finding when circumstances have

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of injury in fact goes only to the question of standing to obtain judicial review"; once standing is established, "the party may assert the interests of the general public in support of his claims for equitable relief."): *Sierra Club v. Adams*, 578 F.2d 389, 391 (D.C. Cir. 1978).

We only note here that the *Burford I* court found that the Federation had demonstrated injury-in-fact based on both the Erman and Peterson affidavits. *Burford I*, 835 F.2d at 314; *see also id.* at 329-39 (Williams, J., concurring and dissenting in part) (noting that intervenor Mountain States conceded in oral argument that "some of the acreage opened to mining was in the vicinity of lands used by [Erman] in Arizona"). *See also* Part II.A.2 *infra*.

not changed would contravene the law of the case. *See* 1B MOORE'S FEDERAL PRACTICE ¶0.404[1] at 119 ("[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand") (emphasis in original); *Doe v. New York City Dep't of Social Serv.*, 709 F.2d 782, 788-89 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

We recognize that *Burford I* analyzed the showing necessary to survive a challenge to standing on a motion to dismiss, which was the posture of this case when it was first appealed. The Government now argues that, because the majority opinion in *Burford I* discussed standing in connection with a motion to dismiss, 835 F.2d at 312, the court never confronted the *Griles test*, which sets a somewhat higher standard for obtaining standing on a motion for summary judgment than on a motion to dismiss. *See Griles*, 824 F.2d at 16 ("[W]hile a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff."). However, what is critical for purposes of review here is that the court in *Burford I* also found standing to support the District Court's grant of a preliminary injunction in favor of petitioners.

The Government's argument completely fails to recognize that, in this case, the burden of establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, at *least as great* as the burden of resisting a *summary judgment motion* on the ground that the plaintiff cannot demonstrate "injury-in-fact." To

obtain a preliminary injunction, NWF not only had to demonstrate specific harm, but also carry the *burden of persuasion*, showing a likelihood of success on the merits. On a motion for summary judgment, a plaintiff need only create a jury issue.

When the *Burford I* court found standing to support a preliminary injunction, it also found sufficient injury-in-fact to support the test of standing under *Griles*. As Judge Williams' separate opinion states, *"the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment."* 835 F.2d at 328 (emphasis added). To the extent that *Griles* requires a higher degree of specificity to show injury-in-fact for standing at the summary judgment stage than would be required on a motion to dismiss, the court in *Burford I* found this burden to be met in upholding petitioners' standing to secure a preliminary injunction. The *Burford I* decision upholding petitioners' standing is therefore the law of the case, which disposes of this appeal.

3. *The Supplemental Affidavits*

Because *Burford I* expressly found that petitioners had satisfied the standing requirements, there was not reason for petitioners to suspect that there remained any standing question on remand. If the District Court felt that the standing question was still open, or that more information was required to assess the issue, then it could have permitted petitioners to supplement the record. *See Griles*, 824 F.2d at 17 n.10 ("a district court can assure that appropriate extra-pleading materials are consulted in

determining the threshold jurisdictional issue"). The law of this circuit allows plaintiffs to supplement the record to cure alleged defects on standing. *See, e.g., National Wildlife Federation v. Hodel,* 839 F.2d 694, 703 (D.C. Cir. 1988). The equities of this case unquestionably compel such an allowance: the papers on which the trial court relied were two years old by the time it requested supplemental memoranda on the standing issue, and there was no indication prior to the trial court's request that NWF should have doubted the adequacy of the affidavits it had already submitted. Moreover, appellees had full opportunity to refute the evidence in these affidavits; the District Court had specifically given appellees ten days to file "any opposition" to NWF's supplemental memorandum. J.A. 345. In this context, we find that it was unfair and an abuse of discretion for the trial court to refuse to consider the affidavits submitted by NWF when the court asked for supplemental memoranda on the standing issue.

No party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests. Thus, even if the original affidavits were insufficient, and even if we assume that this court's decision in *Burford I* did not decide the issue, these supplemental affidavits offer enough detail to establish NWF's standing.[14]

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[14] In light of our decision that the Federation has standing to sue in its own right, it is unnecessary to consider whether plaintiff-intervenor Congressman Bruce Vento also has standing, or whether his standing claims are interdependent with those of the Federation in any way. Congressman Vento has separately appealed the dismissal of his case.

B. *ASARCO's Motion to Intervene*

The District Court found ASARCO's intervention claim to be untimely under Rule 24(a) of the Federal Rules of Civil Procedure, which provides that a party may intervene as a matter of right if, *inter alia*, the motion to intervene is timely filed.[15] We disagree with the trial court's finding only with respect to the Spanish Gulch claims, for ASARCO acted promptly to intervene in the suit as soon as the BLM construed the District Court's preliminary injunction order to invalidate these claims. However, we agree with the District Court on ASARCO's other, more general claims.

The timeliness of a motion to intervene does not depend solely on "the amount of time which has elapsed since the litigation began [but . . . also [on] . . . the related circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already parties in the case." *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir 1972); *see also* NAACP *v. New York*, 413 U.S. 345, 366 (1973) (whether a motion to intervene is timely "is to be determined from all the circumstances"); *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977).

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[15] FED. R. Civ. P. 24(a) (2) also requires that the applicant must claim an interest relating to the property that is the subject of the action; must show that the judicial disposition of the action may impair or impede the applicant's ability to protect its interest; and must show that the applicant's interests are not adequately represented by existing parties.

In this case, the salient factor is not when ASARCO's motion to intervene was filed with respect to the filing of NWF's original suit, or even with respect to the District Court's issuance of the preliminary injunction. Rather, the relevant time from which to assess ASARCO's right of intervention is when ASARCO knew or should have known that any of its rights would be directly affected by this litigation. The record indicates without refutation that ASARCO filed its motion to intervene on June 6, 1988, only 73 days after it received the March 21, 1988, letter from Interior through which ASARCO actually discovered that its Spanish Gulch claims were suspended by the preliminary injunction. Thus, the only remaining question is whether ASARCO can be ascribed with constructive notice before this event. Nothing in the record before us indicates that this question could be answered in the affirmative.

The only possible event that might be construed to have put ASARCO on notice that its interests were at stake in this case would be the February 10, 1986, publication of the preliminary injunction order in the *Federal Register*. However, as the opinion of the District Court notes, the publication in the *Federal Register* was not specific enough vis-a-vis the exact lands affected to "alert even the most careful reader that defendant's classification terminations should inspire protest." *National Wildlife Federation v. Burford*, 676 F.Supp. at 282. Thus, there was no way that this publication could have given ASARCO notice that its Spanish Gulch claims were in jeopardy.

It is clear, then, that ASARCO could not have been required to intervene to protect its Spanish Gulch claims

before it received the letter from the BLM notifying it that these claims would be disrupted. Accordingly, we reverse the District Court's finding that ASARCO's intervention with respect to these claims was untimely. We do agree with the District Court, however, that any other generalized claims (besides the particularized Spanish Gulch claims) that ASARCO wished to raise in this litigation should have been brought in a timely fashion after the *Federal Register* publication of these proceedings; this publication provided sufficient notice of the agency action to arouse any *general* challenges ASARCO may have had. We therefore hold that ASARCO is entitled to bring only its Spanish Gulch claims in District Court because only these claims were timely filed.

We emphasize that we find only that ASARCO's Spanish Gulch claims were timely filed. Because the District Court has not yet considered ASARCO's motion for intervention on the merits, we do not require intervention; instead, we leave the scope of relief to be determined by the District Court. We also note that since we have not reinstated the preliminary injunction that initially produced ASARCO's alleged injury, administrative remedies may now become available to ASARCO that will render intervention altogether unnecessary. Therefore, we remand to the District Court for consideration of ASARCO's motion to intervene under the remaining requirements of Rule 24(a) of the Federal Rules of Civil Procedure.

III. CONCLUSION

We reverse and remand the District Court's summary judgment against NWF on grounds of standing, because we find that the Federation has shown judgment on this

issue. Moreover, to find otherwise would contravene the law of the case. The District Court must now address NWF's claims on the merits and fashion whatever relief it deems appropriate. We further find that the District Court's refusal to consider NWF's supplemental affidavits was an abuse of discretion, and direct the court to take into consideration any appropriate further submissions from the parties necessary to a proper resolution. We decline, however, to reinstate the preliminary injunction because the case should now proceed with dispatch.

We also reverse the trial court's finding that ASARCO's motion to intervene with respect to its Spanish Gulch claims was untimely filed. We remand this issue to the District Court for consideration of the question whether ASARCO is an appropriate intervenor of right given our disposition of the other issues in this case.

So ordered.

Nos. 89-628, 89-640

Supreme Court, U.S.
FILED
DEC 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL WILDLIFE FEDERATION

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QUESTION PRESENTED

1. Whether individuals who use federal lands for recreational purposes, and whose use and enjoyment of those lands will be adversely affected as a direct result of a government program or policy, have standing to challenge that program or policy?

PARTIES

Respondent National Wildlife Federation* accepts the Secretary of the Interior's list of all parties to the proceeding below.

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* The National Wildlife Federation (NWF) is a non-profit corporation incorporated in the District of Columbia. It has no parent companies, subsidiaries, or affiliates in which any outside persons or investors might have an interest. NWF has two "subsidiaries:" National Wildlife Federation Endowment, Inc. and Wildlife Publications, Inc., both based in Washington, D.C. NWF also holds a majority interest in DeSoto Greetings, Inc., a Maryland corporation. NWF has fifty-two "affiliates," one in each state, as well as the Virgin Islands and Puerto Rico. Each affiliate is a non-profit environmental/conservation organization.

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STATEMENT OF THE CASE

This action challenges specific violations of applicable federal statutes in the formulation and implementation of the Department of the Interior's (Department's) ongoing "Land Withdrawal Review Program" (Program) under which land withdrawals and classifications have been terminated. Withdrawals and classifications are two mechanisms used by the Department to protect federal lands against unwise or premature disposition and development. Classifications and withdrawals act to protect federal lands from disposal under the agricultural laws (*i.e.*, homestead, desert land entry, and Indian allotment), from sale, from exchange, from mineral leasing, and from location under federal mining laws. The underlying purpose of classifications and withdrawals is to limit private activities on federal lands in order to maintain the public values of these lands, including recreation and fish and wildlife.[1]

The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.* (1982), enacted in 1976,

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[1] Contrary to the assertions of petitioners, withdrawals and classifications do not mandate any affirmative duty on the part of the Department. Petitioners, therefore, mislead the Court when they suggest that the mere existence of a power site withdrawal in the Grand Canyon requires the construction of a dam. Secretary of the Interior's Petition for a Writ of Certiorari [hereinafter Gov. Br.] at 7. The withdrawals at issue in Arizona were executed in the early 1900's yet the Colorado River still flows freely through the Grand Canyon. What petitioners fail to mention is that the revocation of these withdrawals opened lands immediately adjacent to Grand Canyon National Park to private mineral development.

contains specific provisions governing the disposition of classifications and withdrawals. *See, e.g.*, 43 U.S.C. §§ 1712(d), 1714(l). In addition, the savings provision of FLPMA, Pub. L. No. 94-579, 90 Stat. 2743, provides in Section 701(c) that "[a]ll withdrawals, reservations, classifications, and designations in effect as of the date of the approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law."

Between FLPMA's enactment in 1976 and 1980, the Department engaged primarily in completing an inventory of withdrawn or classified lands. Affidavit 1B of Frank Edwards ¶ 24. In 1981, however, under the direction of the new Secretary of the Interior, James G. Watt, the Department put in motion a comprehensive program to terminate withdrawals and classifications and to open as much land as possible to commercial uses:

> One of the Administration's goals is to build the United States strategic minerals stockpile. An important means to attaining this goal is to open "locked-up" Federal land to mineral exploration and development through aggressive pursuit of the withdrawal review program . . . .

Letter to Secretary of Energy James B. Edwards from Secretary of the Interior James G. Watt (July 13, 1982) (Plaintiff's Exhibit No. 70). New instructions were issued to the field offices that withdrawals were to be eliminated as quickly as possible:

> Since the first of the year, substantial shifts in program emphasis and direction have occurred. More precise priorities have been established; specific production commitments required of the State Offices.

. . . .

> The new administration has stated clearly its objective to eliminate all unnecessary withdrawals of federal lands, opening as many acres as possible to the operation of the mining and mineral leasing laws.

Memorandum to the Acting Director of the Bureau of Land Management from the Assistant Director for Lands and Rights-of-Way (February 20, 1981) (Plaintiff's Exhibit No. 73). Terminations of classifications and withdrawals subsequently proceeded rapidly under the Program. By mid-1985, the Department had terminated protective classifications and withdrawals for approximately 180 million acres of public land. Affidavit of James Parker ¶ 35; Affidavit 1A of Frank Edwards ¶ 25 (Joint Appendix filed in the court of appeals [hereinafter J.A.] 71).

The Program has opened many areas to commercial development, particularly mineral exploitation, that have important recreational, environmental, or other public values – public values that may well be sacrificed as a result of the Department's actions.[2] As the court of appeals noted, changed uses, particularly the opening of

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[2] For example, the Department terminated a reclamation withdrawal covering 34,285 acres in Utah, opening 8,360 acres to the operation of the mining laws, 46 Fed. Reg. 7348 (January 23, 1981), despite the prospect that placer mining in the area would have an adverse impact on two endangered species of fish, as well as potential impacts on endangered bald eagles and peregrine falcons. In addition, campgrounds and other recreational sites have been opened to mining and mineral leasing. *See, e.g.*, 47 Fed. Reg. 11671 (March 18, 1982); 49 Fed. Reg. 32808 (August 16, 1984).

lands to mineral exploitation, can destroy fragile natural resources, as well as the use of natural areas for aesthetic and recreational purposes. (Appendix to the Secretary's Petition for a Writ of Certiorari [hereinafter Gov. App.] 78a-79a).

In July 1985, respondent, the National Wildlife Federation (NWF), filed suit challenging the Program. In its complaint for declaratory and injunctive relief, NWF alleged that the Department's wholesale termination of these protective withdrawals and classifications violated a number of specific provisions of federal law, including FLPMA, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1982), and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* (1982). In its request for relief, NWF sought, among other things, the completion of a programmatic environmental impact statement (EIS), the promulgation of regulations governing the Program, adequate opportunities for public participation in the Program and its activities, and the submission of proposed actions to the Congress for review. Amended Complaint at 16 (J.A. 37). [1]

Simultaneously with the filing of its complaint, NWF moved for a preliminary injunction. Federal defendants responded by filing a motion to dismiss Count II of the complaint on the ground that NWF lacked standing to raise the Department's failure to submit its withdrawal recommendations to Congress.[3] United States Representative John F. Seiberling then moved to intervene on

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[3] NWF claimed in Count II that the Department was in violation of Section 204(1) of FLPMA, 43 U.S.C. § 1714(1), by terminating classifications and withdrawals in eleven western states without prior submission of a recommendation to the President or to Congress.

Count II. The district court granted the intervention of Congressman Seiberling, confirmed his standing as well as that of NWF,[4] and issued a preliminary injunction after finding that NWF was likely to succeed on the merits of at least two of its claims and would be irreparably harmed in the absence of interim relief. (Gov. App. 130a).

Defendant-intervenor Mountain States Legal Foundation (Mountain States) sought reconsideration of the district court's preliminary injunction order arguing that NWF could prove no injury to either itself or its members. The district court rejected Mountain States' claims noting that "[t]his question, while challenging our jurisdiction to grant equitable relief, raises the issue of plaintiff's standing to sue," (Gov. App. 139a), and went on to hold that "[w]e continue to find irreparable injury to plaintiff and reaffirm plaintiff's standing to bring this action," (*id.* at 139a-40a).

In anticipation of filing for summary judgment, NWF submitted affidavits in support of the standing allegations of its complaint. In both its original and its amended complaint, NWF stated that it has over 4.5 million members, many of whom "use and enjoy the environmental resources that will be adversely affected by the challenged actions." Amended Complaint ¶¶ 5, 6 (J.A. 24-25). As examples of the injuries actually suffered

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[4] Upon Mr. Seiberling's retirement from the Congress, the district court ordered the substitution of Congressman Bruce F. Vento, who succeeded Seiberling as Chairman of the Subcommittee on National Parks and Public Lands, and reaffirmed his standing. Order (June 2, 1987) (J.A. 251).

by its members, NWF submitted the affidavits of Peggy Kay Peterson and Richard Loren Erman.

Ms. Peterson lives in Casper, Wyoming and recreates on the federal lands in the South Pass/Green Mountain area of Wyoming. Affidavit of Peggy Kay Peterson (April 7, 1986) ¶¶ 2, 3 (Gov. App. 1901a). She states that her "recreational use and aesthetic enjoyment" of the lands she uses will be adversely affected by the decision to open them "to the staking of mining ~~claims~~ and oil and gas leasing" and that mining or oil and gas development "threatens the aesthetic beauty and wildlife habitat potential of these lands." *Id.* at ¶¶ 6, 7 (Gov. App. 191a). It is undisputed that on May 10, 1984, the Department terminated classification order no. W-6228 and opened 4,455.06 acres of land in the South Pass/Green Mountain area of Wyoming to the operation of the mining law. 49 Fed. Reg. 19904 (May 10, 1984).

The injury to Ms. Peterson's continued use and enjoyment of these lands as a direct result of terminating this classification is corroborated by the Department's own documents. The Department's records reveal that on the day the lands were opened, 199 mining claims were staked. Prior to the imposition of the district court's preliminary injunction, 406 mining claims had been staked on these lands and four mines began operations. Exhibit 9C to Edwards Affidavit 1C (J.A. 118). Government counsel concedes that additional mineral development on these South Pass/Green Mountain lands is imminent. Transcript of Hearing (July 22, 1988)

[hereinafter Transcript] at 58 (J.A. 310).[5] The draft resource management plan prepared for this area by the Department in 1986 acknowledges that:

> [i]n the Green Mountain Management Unit, uranium exploration and development might cause significant losses of crucial winter and winter/yearly elk and muledeer ranges and in trout habitat in the Willowcreek and Cottonwood Creek drainages over the longterm. Elk and trout populations may be lost entirely.

Department of the Interior, Draft Lander Resource Management Plan/EIS (1986) at 228 (Plaintiff's Exhibit No. 61).

Richard Loren Erman lives in Phoenix, Arizona and recreates on federal lands near the Grand Canyon National Park, the Arizona Strip, and the Kaibab National Forest. Affidavit of Richard Loren Erman (April 1986) ¶¶ 2, 3 (Gov. App. 187a). He specifically states that his recreational use and aesthetic enjoyment of lands in the Arizona Strip are adversely affected by the decision of the Department to open the lands to the staking of mining claims. *Id.* at ¶ 6 (Gov. App. 188a). Although the Department contends that the land is of little mineral value, 669 mining claims have been staked on these lands since they were opened and one notice of operations has been filed. Exhibit 11A to Edwards Affidavit 1A (J.A. 84). The patenting of these claims will result in the permanent

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[5] Ms. Peterson and NWF learned during the summer of 1988 that U.S. Energy Corporation plans to develop yet another uranium mine, in part on lands previously closed to mining by classification order no. W-6228. Declaration of Peggy Kay Peterson (August 28, 1988) ¶ 7.

loss of these lands to public recreational use, including that of Mr. Erman.

NWF's complaint also alleged that it is injured as an organization by its inability: 1) to obtain information on the Department's Program and the actions completed under its aegis; and 2) to participate in the Department's decisionmaking.[6] Amended Complaint ¶ 6 (J.A. 24-25). In support of these allegations, NWF submitted the sworn declaration of its then Vice President for Resources Conservation Lynn A. Greenwalt. According to Mr. Greenwalt, NWF has been denied the "opportunity to see and use" the kind of information that would have been available had the Department completed EISs on the Program and the actions completed under its aegis. Declaration of Lynn A. Greenwalt (May 16, 1986) ¶¶ 2-5 (Gov. App. 193a-94a). Mr. Greenwalt also attests that, as a result, NWF's ability to fulfill its obligations to its members who "have contributed financially to the organization, in part, so that they may obtain adequate representation of their legally-protected environmental interests" has been damaged. *Id.* at ¶ 4 (Gov. App. 194a).

On June 17, 1986, federal defendants served subpoenas on NWF seeking to take fifteen depositions in eleven western states and the District of Columbia.[7] The

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[6] FLPMA specifically requires public participation in the land management decisions of the Department. *See, e.g.*, 43 U.S.C §§ 1712(f), 1739(e).

[7] The Secretary's statement of the case indicates that these subpoenas were served following the court of appeals' decision sustaining the preliminary injunction. Gov. Br. at 11-12. This is incorrect.

admitted purpose of these depositions was to demonstrate that NWF could not prove standing to bring this action. NWF moved for a protective order, arguing that it had already produced the affidavits of Ms. Peterson, Mr. Erman, and Mr. Greenwalt proving its standing; and, therefore, additional discovery as to this issue would be unreasonably cumulative within the meaning of Fed. R. Civ. P. 26(c)(1). The district court agreed and issued the requested protective order. (Gov. App. 170a).

NWF moved for summary judgment on June 23, 1986. In their cross-motion, federal defendants again raised the standing of NWF and Mountain States filed yet another motion to dismiss NWF's claims. No defendant challenged the standing of the congressional intervenor.

In December 1987, the court of appeals sustained the district court's preliminary injunction. (Gov. App. at 38a). The majority opinion specifically held that NWF had standing to proceed. (*Id.* at 56a). In his opinion concurring on standing, Judge Williams applied the circuit's criteria for proof of standing on summary judgment as set forth in *Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987), and concluded that:

> the issue of standing is largely academic . . . By the time the case was submitted to this court, the defendants appear to have conceded the bare minimum necessary for standing.

(Gov. App. 85a). The court of appeals denied defendants' petitions for rehearing. (*Id.* at 116a).

Six months after the preliminary injunction was upheld and nearly two years after the motions had been filed, the district court heard oral argument on summary

judgment. At the close of argument on the motions, the district court ordered the case submitted except as to standing and requested additional memoranda from both sides on that issue. Order (July 28, 1988) (J.A. 345). In compliance with the district court's directive, NWF filed a memorandum on its standing that included five supplemental declarations. These declarations are by members of NWF who use federal lands that have been affected by the Program and whose continued use and enjoyment of those lands are threatened by the Department's actions. (Respondent's Appendix [hereinafter R.A.]).

David Doran recreates quite extensively on the federal lands near Coos Bay, Oregon. On April 24, 1984, the Department terminated two protective withdrawals and opened 1500 acres of land on which Mr. Doran recreates to disposal under the public land laws. Declaration of David Doran, ¶ 8 (R.A. 2); 49 Fed. Reg. 17502 (April 24, 1984). The Department proposes to dispose of these lands for the "development of a marine industrial park." Affidavit of Joseph J. Martyak, December 16, 1985, ¶ 24(a) (J.A. 146-47). As a result, lands which currently provide habitat for the endangered snowy plover and peregrine falcon, and birdwatching opportunities for Mr. Doran, will be cleared and paved. Declaration of David Doran ¶ 5 (R.A. 2).

Merlin McColm resides in Elko, Nevada and uses many of the public lands in Nevada for recreation. Areas adjacent to the Roberts and Tuscarora Mountains frequented by Mr. McColm have been opened to mining and other forms of development by the Department. Declaration of Merlin McColm, ¶ 7 (R.A. 5); *see also* 47 Fed. Reg. 6851 (February 17, 1982); 47 Fed. Reg. 7236 (February 18,

1982). He has already observed the ecological damage stemming from these actions in the form of "sedimentation from mining runoff and direct habitat destruction." *Id.*[8]

Stephen Blomeke is an avid hunter and travels "considerable distances across the state of Colorado to access areas containing prime habitat" for game species. Declaration of Stephen Blomeke, ¶ 5 (R.A. 8). In doing so, he uses numerous federal campgrounds and recreation areas. *Id.* Pursuant to the Department's Program, many of these public areas have been opened to disposal and development. *Id.* at ¶¶ 8-10 (R.A. 8-9); *see also* 47 Fed. Reg. 7414-423 (February 19, 1982). Prior to the issuance of the injunction in this case, twenty-five mining claims already had been staked on campgrounds frequented by Mr. Blomeke. Exhibit 11A to Edwards Affidavit 1A (J.A. 86).

Will Ouellette lives in rural New Mexico and uses the federal lands in the surrounding countryside on a daily basis. Declaration of A.L. Ouellette, ¶¶ 1-5 (R.A. 11-12). Many of the areas he uses, including the Tent Rocks Recreation Area, have been opened to disposal and development by the termination of protective land classifications. *Id.* at ¶ 9 (R.A. 12-13). The Tent Rocks area of New Mexico is a unique environment. "Comparable formations are found only in Turkey." Bureau of Land Management, *Di[illegible] Rio*

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[8] According to federal defendants' own submissions, three mining claims have been staked on 80 acres previously protected by these withdrawals. Exhibit 11A to Edwards Affidavit 1A (J.A. 89). All three were staked the year the lands were opened. *Id.* No mining claims were staked the previous two years. *Id.*

Puerco Resource Management Plan and Environmental Impact Statement at C-30 (1985) (attached as Appendix III to Declaration of A.L. Ouellette). Yet, the Department terminated the classifications that protected these lands for public enjoyment and recreation, to the detriment of Mr. Ouellette as well as many others.

In addition, Ms. Peterson supplemented her earlier affidavit. In her supplemental declaration, she identifies in detail the challenged actions responsible for her injury and provides an example of a specific proposal to develop a uranium mine on lands which previously had provided Ms. Peterson with undisturbed wildlife habitats for hiking, camping, hunting, and fishing. (R.A. 16).

In their responsive memoranda, defendants produced no evidence to contradict the statements in these supplemental declarations.

The district court summarily rejected NWF's supplemental declarations as untimely and "violative of its order;" reversed its previous rulings on NWF's standing; dismissed the entire case, including the unheard claims of Congressman Vento; and dissolved the preliminary injunction.

At this point, NWF appealed. A three-judge panel of the court of appeals unanimously reversed the holding of the district court on three separate grounds:

> (1) that the affidavits submitted by NWF in support of its motion for summary judgment "clearly alleged facts showing that its members were 'among the persons injured' by [the Department of the] Interior," (Gov. App. 15a);

(2) that since these same affidavits had provided "adequate grounds for NWF to establish irreparable harm" for a preliminary injunction, they also demonstrated sufficient injury-in-fact to support the test of standing, and the court of appeals' previous opinion upholding the preliminary injunction was law of the case on this issue, (*id.* at 19a); and

(3) that the equities of this case "unquestionably compel an allowance" on the part of NWF to supplement the record to cure any alleged defects on standing, and that NWF's supplemental declarations "easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests," (*id.* at 21a).

The court of appeals then remanded the case for disposition on the merits. Because it directed the district court to address NWF's substantive claims "with dispatch," the court of appeals did not reinstate the preliminary injunction. (*Id.* at 25a).

The petitions for *certiorari* filed by the Secretary and Mountain States seek review of this decision.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any federal court of appeals. Indeed, the Secretary alleges no such conflict. Moreover, the issues raised by petitioners are not of such exceptional importance as to justify review by this Court, especially in light of the essentially factual character of the petitioners' questions for review. Accordingly, a writ of *certiorari* is unwarranted.

I. THE DECISION OF THE COURT OF APPEALS IS CORRECT AND IS CONSISTENT WITH THIS COURT'S REQUIREMENTS FOR FEDERAL STANDING.

In two separate opinions, unanimous panels of the court of appeals determined that NWF has standing to pursue this litigation. This holding does not represent a departure from existing standing law but rather falls squarely within its tenets. Indeed, petitioners do not charge that the holding in this case conflicts with the decision of another court of appeals; nor can they point to a divergence from controlling Supreme Court precedent.

A. The Court of Appeals' Decision is Consistent with Prior Supreme Court Precedent

This Court summarized the constitutional requirements of standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), as follows:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, (1976).

Id. at 472. It is the first of these thresholds, or the "injury-in-fact" requirement, that is at issue in the instant case.

(Gov. App. 12a). Following the guidance of the Court's prior opinions, that injury must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), yet it need not be great; an "identifiable trifle" will suffice, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973); and standing extends to those who show some type of environmental injury, *id.* at 686; *see also Japan Whaling Association v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

The requirements for establishing standing in cases involving such environmental injury are well-settled. Thus, in *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), this Court denied standing to the Sierra Club on its allegation that the government's decision to permit development in a national park would "destroy or . . . adversely affect" the natural resources in the park and would "impair . . . enjoyment . . . for future generations." The Court acknowledged that this was a cognizable injury but found that it did not amount to injury-in-fact sufficient to uphold standing because the Sierra Club had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 734-35. In *SCRAP*, however, the Court found that the plaintiff organizations had alleged sufficient injury to establish standing to challenge an ICC rate increase. The plaintiffs in *SCRAP* asserted that their members used "the forests, rivers, streams, mountains, and other natural resources in the Washington Metropolitan area" for various recreational and aesthetic purposes and that these uses would be adversely affected by the challenged conduct. *SCRAP*, 412 U.S. at 678.

In the instant case, NWF alleged in its complaint that its members "use and enjoy the environmental resources that will be adversely affected" by the challenged Program. Amended Complaint ¶ 6 (J.A. 25). As evidence in support of these allegations, NWF initially submitted the affidavits of Ms. Peterson and Mr. Erman. Both Ms. Peterson and Mr. Erman, as members of NWF, state that their "recreational use and aesthetic enjoyment" of particular federal lands will be adversely affected by the decision to open them "to the staking of mining claims and oil and gas leasing" and that mining or oil and gas development "threatens the aesthetic beauty and wildlife habitat potential of these lands." (Gov. App. 187a-92a). Their affidavits use the phrase "in the vicinity" to describe in lay terms the location of the tracts at issue.[9] Both Ms.

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[9] There is no evidence in the record to support the Secretary's claims that the area of land in the vicinity of South Pass/Green Mountain, Wyoming on which Ms. Peterson states she recreates constitutes over two million acres. Gov. Br. at 20. Ms. Peterson's affidavit contains no such statement. The Department's own documents describe the federal land holdings in South Pass and Green Mountain as 14,000 and 126,000 acres, respectively. Department of the Interior, Draft Lander Resource Management Plan/EIS (1986). Ms. Peterson specifically limits her injury only to those unique tracts of federal land within South Pass/Green Mountain that have been opened to mining and mineral leasing by the Department. Affidavit of Peggy Kay Peterson at ¶ 6 (Gov. App. 191a).

The five million acre figure for Mr. Erman's recreational use in the Arizona Strip is also a gross exaggeration. Gov. Br. at 9. Mr. Erman's affidavit contains no such figure and neither does the affidavit of G. William Lamb on which the Secretary relies.

Peterson and Mr. Erman specifically state that they are injured by the opening of lands they use to private mineral development.[10]

The Secretary's attempt to distinguish *SCRAP* is unavailing. Gov. Br. at 20. Like the instant case, *SCRAP* was a challenge to government action with nationwide effects. Standing to challenge an ICC freight rate increase was founded upon individual allegations of use of the natural resources in the Washington metropolitan area. Similarly, NWF's complaint alleges use of environmental resources placed at risk by government action and NWF's affidavits provide direct evidence of the use of threatened natural areas by its members.

The court of appeals correctly interpreted Ms. Peterson's affidavit to demonstrate that NWF's "members were 'among the persons injured' " by the Department's challenged actions. (Gov. App. 15a). The court of appeals did not, as the Secretary suggests, "presume" that a "mere claim of standing necessarily implies a factual basis to support it." Gov. Br. at 21. Indeed, drawing on *dicta* in this Court's *SCRAP* decision, the District of Columbia Circuit has adopted a stringent standard for proof of standing at the summary judgment stage. *Wilderness Society v. Griles*, 824 F.2d at 16. To accomplish the required showing, NWF had to: (1) identify lands that are

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[10] If there was any doubt that Ms. Peterson uses lands actually affected by the Department's Program to terminate classifications and withdrawals, it was resolved by her supplemental declaration in which Ms. Peterson identifies the precise classification terminations that will impair her use of federal lands. Declaration of Peggy Kay Peterson ¶ 7-9 (R.A. 16-17).

affected by the challenged government action; (2) demonstrate that third parties are likely to respond to that government action with development activites; and (3) identify members in specific areas that would suffer an adverse impact from such third-party conduct. *Id.* at 10-12. The court of appeals reviewed the evidence contained in Ms. Peterson's affidavit, as well as other evidence in the record, and drew the only logical inference available to it, *i.e.*, that Ms. Peterson, in fact, is injured by the Department's actions.

Having determined that Ms. Peterson's affidavit was sufficient to demonstrate NWF's standing, the court of appeals declined to address the affidavit of Mr. Erman.[11] (Gov. App. 18a). It summarily reaffirmed its prior rejection of the argument raised by Mountain States below, and resurrected by the Secretary in his petition, that NWF must prove that it is injured by each action completed under the auspices of the Program and on every acre of federal land affected in order to challenge the Program itself. (*Id.* at 16a). The court of appeals based its rejection of this argument upon controlling precedents of this Court set forth in *International Union, United Automobile,*

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[11] The court of appeals also declined to discuss the injury to the organization itself described in Mr. Greenwalt's declaration. This Court's recent opinion in *Public Citizen v. U.S. Department of Justice*, 109 S. Ct. 2558, 2563-64 (1989), however, specifically recognizes that the denial of information or lawful participation constitutes injury for purposes of standing. Mr. Greenwalt's declaration establishes that NWF has been injured by the denial of the kind of information normally included in EISs prepared under NEPA. (Gov. App. 194a).

Aerospace and Agricultural Implement Workers of America v. Brock, 477 U.S. 274 (1986), and *Warth v. Seldin*, 422 U.S. 490.[12] (Gov. App. 55a).

In sum, there is no important question of federal law at issue in this case that requires the intercession of the Supreme Court. The Secretary's petition reduces to a dispute over the court of appeals' interpretation of Ms. Peterson's original affidavit. According to the Secretary, neither Ms. Peterson nor Mr. Erman claim to use lands actually affected by the challenged Program, only lands "in the vicinity" and the court of appeals, therefore, misinterpreted Ms. Peterson's original affidavit. Gov. Br. at 20. Under any circumstances, this alleged misreading of Ms. Peterson's affidavit would rarely warrant the scrutiny of the Supreme Court.[13] In light of the clarification

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[12] In the *International Union* case, for example, the plaintiff labor union gained standing to challenge the Department of Labor's nationwide policy regarding eligibility for unemployment benefits on the basis of injury to any *one* of the union's members. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. at 281-91.

[13] This is particularly so since, in order to review this dispute, the Court will have to wade through the evidence presented by both sides and determine the factual content of NWF's affidavits and exhibits as well as those submitted by defendants. Moreover, in considering this question on summary judgment, the Court must, first, believe NWF's evidence and, second, resolve all justifiable inferences in NWF's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Even read in a manner exceedingly favorable to defendants and unaided by Ms. Peterson's supplemental declaration, the phrase "in the vicinity of" is, at most, ambiguous on the issue of whether Ms.

(Continued on following page)

provided by Ms. Peterson herself in her supplemental declaration, however, the Secretary's assertions are singularly undeserving of the Court's attention. In her supplemental declaration, Ms. Peterson identifies the precise actions by the Department that will impact her use of federal lands by opening them to mining. She also identifies a specific proposal to "mine a significant portion of the federal lands which I use for recreational purposes and for aesthetic enjoyment." Declaration of Peggy Kay Peterson ¶ 7-9 (R.A. 16-17). The court of appeals' conclusion that Ms. Peterson, in fact, is injured by the actions of the Department is inescapable upon a cursory reading of this declaration.

B. The Court of Appeals' Decision to Permit Supplementation of the Record is Correct

As the court of appeals noted, "[n]o party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests." (Gov. App. 21a). Instead, the Secretary asks the Court to place an embargo on any

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(Continued from previous page)

Peterson's recreational use extends to lands affected by the challenged actions. Given the presumptions established by the summary judgment rules, this ambiguity must be resolved in favor of Ms. Peterson and NWF. *Id.*

The instant case is not comparable to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the plaintiff offered no evidence whatsoever in opposition to the defendants' motion for summary judgment. In contrast, NWF submitted several member affidavits, as well as the Department's own documents, *see* discussion *supra* pp. 6-7, in support of its standing. NWF also proffered additional evidence.

supplementation of the factual record on standing in a case which has not yet gone to trial.[14] Such a holding would be inconsistent with prior Supreme Court precedent. This Court repeatedly has remanded cases to permit supplementation of the factual allegations in support of standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 55 n.6 (1976); *Warth v. Seldin*, 422 U.S. at 501-02; *Sierra Club v. Morton*, 405 U.S. at 735 n.8.

It would also be wasteful of judicial resources to require the dismissal and re-filing of cases involving curable jurisdictional defects. *See Costello v. United States*, 365 U.S. 265 (1961). The Department's Program is ongoing. NWF can re-file its complaint and cure any alleged deficiency on standing by submitting evidence of the continuing injury its members and the organization suffer as the result of the Department's actions.

Moreover, to dismiss the instant case on the basis of such a ruling would be a gross injustice. Prior to its order

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[14] The Secretary's argument that any supplementation of the record is improper is founded on a narrow reading of Fed. R. Civ. P. 56(c) requiring the service of summary judgment materials "prior to the day of the hearing." Yet, defendants were permitted to introduce new evidence concerning the substantive merits of their case at oral argument, in violation of the strict letter of Fed. R. Civ. P. 56(c). Transcript at 55-56, 92. (J.A. 307-08, 344). NWF should have been afforded an opportunity to respond.

Moreover, the district court requested additional submissions from both sides on the standing issue only after oral argument.

dismissing the case, the district court previously issued three orders upholding NWF's standing. No one challenged the standing of NWF's co-plaintiff in the case, Congressman Bruce F. Vento.[15] The court of appeals sustained the issuance of a preliminary injunction holding that NWF had proved irreparable harm to its members. (Gov. App. 78a). The court of appeals unanimously upheld NWF's standing to bring the suit. Defendants did not seek review of that decision. No change in either the factual situation or this Court's dispositions on standing was brought to the attention of the district court. In short, NWF had no reason to believe that its standing was still at issue until suddenly, at the close of oral argument on cross-motions for summary judgment, the district court indicated that it wanted additional submissions on standing. (Gov. App. 20a). In response to the court's request, NWF submitted a memorandum with supporting declarations. Defendants had a full opportunity to refute the evidence in those declarations. (*Id.* at 21a). Under these rather unusual circumstances, the court of appeals properly found that the district court should have permitted NWF to submit additional evidence in support of standing prior to dismissing the case for lack of jurisdiction. On the basis of these supplemental declarations, NWF's standing is irrefutable.

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[15] NWF's co-plaintiff, Congressman Bruce F. Vento did not join in NWF's motion for summary judgment and his standing was not addressed in the district court's opinion dismissing the case. If Mr. Vento has standing to pursue this litigation, then a separate basis for NWF's standing is unnecessary. *Watt v. Energy Action Education Foundation*, 454 U.S. 151, 160 (1981). The district court upheld the Congressman's standing twice prior to dismissing the case. *See* discussion *supra* pp. 4-5.

II. FEDERAL PROGRAMS ARE NOT IMMUNE TO CHALLENGE IN THE COURTS

Both petitioners contend that the Department's actions at issue in this case are somehow insulated from judicial review. The Secretary suggests that the court of appeals' grant of standing in this case violates the separation of powers clause of the Constitution, but he cites no caselaw to support this theory.[16] Mountain States, citing *Ashwander v. TVA*, 297 U.S. 288 (1936), and *Allen v. Wright*, 468 U.S. 737 (1984), alleges that this Court has precluded challenges to government programs or policies, including NWF's challenge to the Department's Land Withdrawal Review Program. Both arguments are untenable. They cannot be reconciled with this Court's prior decisions on standing.

A. The Court of Appeals' Standing Decision Does Not Violate the Separation of Powers Clause

The Secretary contends that this litigation will necessarily transform a single district court judge into a "national land use czar," Gov. Br. at 22; and, therefore, standing to challenge the Department's actions must be denied in order to avoid a violation of the separation of powers clause of the Constitution. This contention is totally unfounded.

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[16] Indeed, as Judge Bork noted in his opinion in *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987):

> the Supreme Court has never said explicitly that the separation of powers clause concept leads it to deny [standing] where it otherwise might be found . . . .

Id. at 807.

NWF is not "seeking judicial supervision of the Secretary's entire administration, throughout the Nation, of his duties under FLPMA." Gov. Br. at 23. Instead, like the plaintiffs in *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983), who sought compliance with the reporting requirements of NEPA, NWF is asking only that the "agency conform[] with controlling statutes." As such, this litigation is not so "overwhelming" as the Secretary suggests. Gov. Br. at 22. In fact, it is currently submitted for final adjudication on cross-motions for summary judgment.

Further, the source of the alleged violation of the separation of powers clause cited by the Secretary is not the court of appeals' recent standing decision but rather the preliminary injunction upheld by the court of appeals nearly two years ago. The Department chose not to seek review of that decision; perhaps because the vast majority of the Department's activities were unimpeded by the injunction. As the district court made clear:

> activities that would have been permitted on the affected public lands under the previous withdrawals and classifications prior to revocation or termination may still take place.

(Gov. App. 146a). These same withdrawals and classifications were originated by the Department and were in effect for decades prior to their termination. The effect of the court's preliminary injunction was merely to reinstate these withdrawals and classifications.

The preliminary injunction subsequently has been dissolved. However, in the three years it was in place, only four individuals intervened in the case seeking an

exemption from its provisions.[17] The Department itself never sought prior permission of the district court to proceed with any individual management action.

In its request for permanent relief, NWF merely prays that the Department's actions be conducted in accordance with statutory requirements, including, for example, the completion of EISs under NEPA. That this task may prove burdensome to the Department, according to the Secretary, hardly relieves the agency of its statutory obligations; nor does it remove the jurisdiction of the federal courts to review NWF's claims.[18]

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[17] In three instances, it was the Department's own overbroad interpretation of the injunction that required the intercession of the district court. *See, e.g.*, Order (January 6, 1987) ("the preliminary injunction . . . does not apply to the geothermal operations of the Department of Water and Power for the City of Los Angeles . . . [and the Department] shall forthwith vacate and set aside its suspension order . . . ") (Gov. App. 165a-66a).

[18] Under the APA, agency action is judicially reviewable:

> except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a). Over the years, this Court has emphasized that this is a very narrow exemption. As the Court explained in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), the reason for this rule is that:

> [w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.

Id. at 681.

(Continued on following page)

B. Standing to Challenge Government Programs Has Not Been Abolished

Mountain States' suggestion that this Court essentially has eliminated all challenges to government programs is baseless. Neither *Ashwander v. TVA*, 297 U.S. 288, nor *Allen v. Wright*, 468 U.S. 737, provides support for this proposition.

In *Ashwander v. TVA*, shareholders of the Alabama Power Company brought a challenge to the constitutionality of the "Tennessee Valley Authority Act in all its bearings" based upon the execution of a single contract with the Alabama Power Company. 297 U.S. at 325. The plaintiffs also sought to have the Court issue a "decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies." *Id.* This Court sustained the circuit court's determination to limit the plaintiffs' challenge to the validity of the contract itself, finding that the plaintiffs' other claims were founded "merely upon 'assumed potential invasions' of rights . . . ." *Id.* at 324-25 (quoting *Arizona v. California*, 283 U.S. 423, 462 (1931)).

The United States Court of Appeals for the District of Columbia Circuit explained and applied *Ashwander v.*

(Continued from previous page)

Moreover, this is not a case like *Webster v. Doe*, 108 S. Ct 2047, 2052 (1988), in which the applicable statutory standard "exudes deference" to the agency and thus "foreclose[s] the application of any meaningful judicial standard of review." The Secretary can make no claim that such unbridled discretion is available to him under the applicable provisions of FLPMA and NEPA. *See, e.g.*, NEPA § 102, 42 U.S.C. § 4332 ("all agencies of the Federal Government shall include . . . a detailed statement . . . on the environmental impact of the proposed action . . . .")

TVA in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission (SIPI)*, 481 F.2d 1079 (1973), commenting that *Ashwander* stands for the unsurprising proposition that:

> [t]raditional principles of ripeness dictate that judicial review be reserved for problems which are real and present, not hypothetical and remote.

Id. at 1087 n.29.[19] The court of appeals in *SIPI* went on to hold that even though the liquid metal cooled fast breeder reactor [LMFBR] program at issue in *SIPI* was "in the research and development stage and no specific implementing action which would affect the environment had yet been taken," the program was of sufficient "definite and concrete character" to overcome the *Ashwander* concerns. *Id.* Thus, the distinguishing factor in *SIPI* was the lack of abstract questions, not the number of proposed actions, as Mountain States contends.[20] Mountain States Legal Foundation's Petition for a Writ of Certiorari [hereinafter MSLF Br.] at 12.

In the instant case, the challenged program also has found sufficient "fruition in action of a definite and

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[19] *Compare Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (plaintiffs living in proximity to proposed nuclear facilities were held to have standing to challenge the constitutionality of the Price-Anderson Act.)

[20] Mountain States' description of *SIPI* is simply incorrect. The goal of the LMFBR program was to develop new nuclear reactor technology for "widespread deployment," not merely to build a single facility. *SIPI*, 481 F.2d at 1082.

concrete character" to be ripe for review. *Ashwander v. TVA*, 297 U.S. at 324. By its own admission, the Department has already completed several hundred terminations of withdrawals and classifications under the auspices of the Program and, as a direct result, mining claims have been staked and oil and gas leases issued. Affidavit of Joseph J. Martyak (December 16, 1985) (J.A. 119-59). NWF need not wait until each of the Program's proposed activities are completed to seek review of the Department's legal failures regarding the formulation and implementation of the Program.

Mountain States' discussion of the Court's holding in *Allen v. Wright*, 468 U.S. 737, is also wrong. The case does not support Mountain States' sweeping statement that this Court has eliminated standing to challenge government programs. This Court and other federal courts have upheld numerous legal challenges to government action on a programmatic scale.[21] As the court of appeals

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[21] *See, e.g., International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. at 281-91 (union had standing to pursue across-the-board challenge to Department of Labor policy on eligibility for trade readjustment allowance benefits on the basis of injury to any one of union's members); *Blum v. Yaretsky*, 457 U.S. 991 (1982), (Gray Panthers organization and patients in skilled nursing facilities had standing to challenge New York State's Medicaid program which denied benefits to patients recommended for transfer to facilities providing a reduced level of care); *Watt v. Energy Action Education Foundation*, 454 U.S. 151 (challenge to the federal government's five-year offshore mineral leasing program; standing upheld to seek review of the

(Continued on following page)

recognized, Mountain States' suggestion that NWF ought to file separate challenges to each of the hundreds of actions completed under the Program at issue in this case, MSLF Br. at 12, is both "unsupported by caselaw" and "illogical." (Gov. App. 55a-56a). NWF is challenging a "pattern of practice embodied in the Department's conduct of its Program." (*id.*); *see NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 158 (1st Cir. 1987). The mere fact that separate decision notices of each termination were issued by the Department is irrelevant when, as NWF alleges, each decision to terminate individual classifications and withdrawals was guided by

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(Continued from previous page)

Secretary of the Interior's choice of bidding systems for lease issuance); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (without passing on standing, the Court heard a challenge to the validity of an FCC policy statement that had not yet been applied to any set of facts); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S 150 (1970) (sellers of data processing services had standing to challenge a ruling of the Comptroller of the Currency allowing national banks to provide such services); *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), (environmental organizations had standing to challenge the Secretary of the Interior's determination that all federally-funded projects in foreign countries were exempt from the consultation provisions of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1982)); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987) (environmental organizations had standing to challenge the nationwide pesticide spraying program of the U.S. Forest Service); and *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1986) (environmental organizations had standing to challenge the national regulatory program of the federal Office of Surface Mining).

unlawful directives at the Program level.[22] It makes little sense either for coherent management of the federal lands or for the exigencies of the federal court system to force multiple lawsuits challenging these same violations of law.[23]

The Court's opinion in *Allen v. Wright* does not require such an irrational result. The opinion in *Allen v. Wright* holds that where a plaintiff cannot show that his injury is "fairly traceable" to the challenged actions of a government program, the separation of powers clause of the Constitution prohibits a grant of standing. *Id.* at 761 n.26. The plaintiffs in *Allen v. Wright* were challenging the tax-exempt status of racially discriminatory schools. The

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[22] For example, NWF is seeking the preparation of a programmatic EIS under NEPA in accordance with this Court's decision in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

Mountain States attempts to distinguish the instant case from *Kleppe* by arguing that the Program at issue will have no cumulative impacts. MSLF Br. at 12-13. This is a merits question that has little bearing on NWF's standing. Furthermore, the Program will determine the legal status of millions of acres of federal lands. The impact of such massive shifts in land use will be profound. Indeed, Mountain States itself has identified a range of environmental impacts stemming from the Program, *id.*; none of which was analyzed in the context of an EIS. For example, the Program already has opened two million acres of land in the Colorado watershed to mineral and agricultural development. Yet, the cumulative effects of this development on the watershed were never considered.

[23] This piecemeal litigation would provide no opportunity for the Department to correct any generic deficiencies in the conduct of its Program and to proceed lawfully with respect to future actions. Instead it would require the courts to undo each and every withdrawal and classification termination.

majority found the chain of causation between the plaintiffs' injury, the diminished availability of a desegregated education, and the defendants' actions, the tax exemptions, to be too attenuated to confer standing.

The instant case presents *no* similar facts. Should the court in the instant case order the Department to prepare EISs in compliance with the provisions of NEPA, the Department presumably will comply with the court's order and NWF will receive the information on environmental impacts it has thus far been denied. Moreover, the withdrawals and classifications which the Department seeks to eliminate represent an absolute bar to specified uses of federal lands. If the withdrawals and classifications at issue in the instant case are continued, the Court is entitled to assume that third parties will act lawfully and will not initiate development activities on lands that are closed to them and that, therefore, NWF's members' use of those lands will not be impaired. Under these circumstances, a determination that plaintiffs have standing is wholly proper. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 45 n.25 (standing to challenge government action is proper where third party conduct would have been illegal absent government action).

Finally, Mountain States seeks to convey the impression that this case inevitably must have radical and unusual impacts on third parties. This simply is not so. Litigation often has impacts on individuals who are not parties. Contrary to Mountain States' assertions, however, the instant case need have no impact at all on those individuals who relied on the actions of the Department and who acquired title to federal lands prior to the filing

of NWF's complaint. MSLF Br. at 13-15. There is no cloud on their title. NWF has not asked the district court to invalidate pre-existing mining claims or mineral leases or to overturn completed sales or exchanges of previously withdrawn lands. (Gov. App. 145a). In its request for a preliminary injunction, NWF merely sought the preservation of the *status quo* by preventing the staking of new mining claims, the issuance of additional mineral leases, and the loss of additional public lands to private interests during the pendency of this litigation. Similarly, NWF's request for permanent relief merely asks that the same *status quo* be maintained until the Department has complied with the statutory requirements for opening these lands.

This is not a draconian request. Investment uncertainty is nothing new for would-be mining claimants and mineral leaseholders, just as it is nothing new for persons who wish to consummate other land transactions with the Department, or to obtain permits or other authorizations for private activities on public lands. Such persons hold no more than an expectancy of government largess, with no assurance that government benefits will be forthcoming.[24]

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[24] *See, e.g., Lewis v. Hickel*, 427 F.2d 673 (9th Cir. 1970) (rejection of land exchange based upon adoption of new regulations was proper; until lands are patented, transaction constitutes nothing more than a proposal under which no contract rights arise); *Winkler v. Andrus*, 614 F.2d 707 (10th Cir. 1980) (Secretary of the Interior has broad authority to cancel leases for administrative errors); *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364 (9th Cir. 1976) (Secretary of the Interior has

(Continued on following page)

In any event, the court of appeals' decision is interlocutory. There is no final decree in this case. What the eventual outcome may be is unknown at this time. In the interim, mere speculation about the relief that ultimately might be granted should not act as a bar to any adjudication of NWF's claims. Full consideration of all the equities involved necessarily will precede the issuance of any permanent injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

CONCLUSION

For the reasons stated above, the petitions for writs of *certiorari* should be denied.

Respectfully Submitted,

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NORMAN L. DEAN, JR.*
NATIONAL WILDLIFE FEDERATION
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December, 1989

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(Continued from previous page)

continuing jurisdiction with respect to public lands and he is not estopped by principles of the finality of administrative action from correcting an erroneous decision made by his subordinates or predecessors).

Nos. 89-628, 89-640

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT NATIONAL WILDLIFE FEDERATION

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF DAVID DORAN

Declarant, DAVID DORAN, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Oregon Wildlife Federation (OWF).

2. I reside at 2753 N. 32nd, Springfield, Oregon 97477.

3. I frequently use the public lands, in particular, I use the federal lands adjacent to Coos Bay located along the south-central coast of Oregon. These lands are administered by the Bureau of Land Management (Bureau) and the U. S. Department of the Interior (Department).

4. My uses of these federal lands include hunting, fishing, camping and hiking. I pursue these activities for recreational purposes and aesthetic enjoyment. I hunt both elk and black tail deer on these federal lands located along the north spit of Coos Bay and fish off coastal areas which are also located on, or which can only be accessed

through, these federal lands. I derive substaintial benifits (sic) of food and sport from such hunting and fishing.

5. I also hike and camp on these federal lands along the northern and southern spits of Coos Bay. From these activities I benifit (sic) through aesthetic enjoyment of the rich natural beauty of these lands and the interesting and diverse species of wildlife which inhabit the Coos Bay habitat. Several of the bird species I have viewed, such as the snowy plover (a state listed endangered species) and peregrine falcon, are quite rare with a substantial percentage of their population inhabiting the federal lands adjacent to Coos Bay.

6. I am aware that my continued recreational and aesthetic enjoyment of the Coos Bay lands depends upon their being managed by the Bureau and Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

7. I am also aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

8. Among the Departmental actions challenged in the NWF lawsuit is the decision to revoke Secretarial Orders of December 13, 1887, and September 20, 1890, which opened 1,558 acres of land which I use to surface entry and mining. This revocation also made 47 acres of land which I use available for disposal by exchange. 49 Fed. Reg. 17502.

9. These unlawful actions of the Bureau and the Department adversely affect my interest in recreational use and aesthetic enjoyment of the federal lands by opening these lands to development activities which threaten the aesthetic beauty and wildlife habitat of these lands. These actions also adversely affect my interest in seeing that the Bureau and Department fully comply with the laws pertaining to the preservation and protection of natural resources on the federal lands they administer.

10. My interests are being fully and adequately reqresented (sic) by the NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 1988.

/s/ David W. Doran
DAVID DORAN

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF MERLIN McCOLM

Declarant, MERLIN McCOLM, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF).

2. I reside in Elko, Nevada. My address is P.O. Box 1362, Elko, Nevada 89801.

3. I use the public lands extensively. In particular, I use the federal lands administered by the Bureau of Land Management (Bureau) and the Department of the Interior (Department). I have used and I continue to use such federal lands located throughout the state of Nevada and elsewhere. Particular areas which I use frequently include the Roberts Mountains south of Elko and the Tuscarora Mountains and Independence Range to the northwest of Elko.

4. My use of these public lands is for purposes of recreation and aesthetic enjoyment. I hunt deer, antelope, sage

grouse and other game species for sport and food, and often travel to particular tracts of the above mentioned federal lands where habitats for these species are known to exist.

5. My recreational and aesthetic enjoyment of these lands depends upon their being managed by the Bureau and Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

6. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

7. Pursuant to this unlawful Program, the Bureau and Department has revoked withdrawals and terminated classifications covering specific areas which I use for the above stated recreational and aesthetic purposes. For example, areas adjacent to the Roberts and Tuscarora Mountains which I use (and which have been protected as water reserves under Executive Orders dated February 8, 1923 and November 20, 1925) have been opened to mining and other forms of development by means of these unlawful actions by the Bureau and Department. 47 Fed. Reg. 6851, 7236. I have since personally observed evidence of ecological damage to these areas and others in the form of sedimentation from mining runoff and direct habitat destruction.

8. These unlawful actions by the Bureau and the Department have resulted in actual injury to my recreational use

and aesthetic enjoyment of these federal lands. By opening many specific areas which I use to the staking of mining claims, oil and gas leasing and other forms of development, such actions injure my enjoyment of these lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.

9. These unlawful actions of the Bureau and the Department adversely affect my interest in recreational use and aesthetic enjoyment of the federal lands, and adversely affect my interest in seeing that the Bureau and Department fully comply with the laws pertaining to the preservation and protection of the federal lands and their natural resources.

10. My interests are being fully and adequately represented by the NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 1988.

/s/ Merlin McColm
MERLIN McCOLM

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF STEPHEN BLOMEKE

Declarant, STEPHEN BLOMEKE, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Colorado Wildlife Federation (CWF).

2. I reside at 1715 Ninth Avenue, Longmont, Colorado 80501.

3. I have lived in Colorado for eight years. During that time I have frequently used the federal lands which are administered by the Bureau of Land Management (Bureau) and the U.S. Department of the Interior (Department). I currently use these federal lands located throughout the state of Colorado and elsewhere, and I intend to continue such frequent and widespread use into the future.

4. I use these federal lands for recreational purposes and aesthetic enjoyment. My uses include hunting, fishing, camping and hiking. Among the game animals I hunt are grouse, deer, elk, antelope and ptarmigan. I fish primarily trout.

5. I often travel considerable distances across the state of Colorado to access areas containing prime habitat for these species. In so doing, I have used and continue to use the various campgrounds and recreation areas located on these federal lands.

6. Because of my extensive use of these federal lands, I have a personal interest in the management programs of the Bureau and the Department. My continued recreational and aesthetic enjoyment of these lands depends upon their being managed by the agencies in full compliance with the laws relating to preservation and protection of natural resources on the public lands they administer.

7. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

8. I am also aware that many Public Land orders and Secretary of the Interior orders have withdrawn specific areas of the federal lands which I use for recreational and aesthetic uses. These include: Public Land Order 2302 of March 14, 1961 (Indian Peaks Campground), Public Land Order 2553 of December 11, 1961 (Strawberry Campground), Public Land Order 2558 of December 11, 1961 (Gordon Gulch Campground, Ward Picnic Ground, Park

Creek Recreation Area and Sheep Creek Fish Habitat Study Area), and Public Land Order 2732 of July 19, 1962 (Buffalo Pass Campground).

9. Pursuant to the above stated Withdrawal Review Program, the Bureau and the Department unlawfully revoked all of the protective withdrawals which I use and which are mentioned in paragraph 8 above. *See* Public Land Order 6170, 47 Fed. Reg. 7414 *et. seq.* (Appendix I attached hereto).

10. As a result of these unlawful actions by the Bureau and the Department, these specific federal lands which I frequently use for the above stated recreational purposes and aesthetic enjoyment have been opened to the staking of mining claims and other forms of development. Such actions injure my enjoyment of these lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.

11. My interest in recreational use and aesthetic enjoyment of the federal lands, and my interest in seeing that the laws pertaining to the preservation and protection of federal lands and their natural resources are complied with, have been adversely affected by these unlawful actions of the Bureau and the Department.

12. My interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August ___, 1988.

/s/
STEPHEN BLOMEKE

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF A. L. (WILL) OUELLETTE

Declarant, A.L. (WILL) OUELLETTE, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the New Mexico Wildlife Federation (NMWF).

2. I reside at Star Route, Box 12, Placitas, New Mexico 87043.

3. I have used the federal lands extensively for many years and I continue to use these lands almost on a daily basis. In particular, I use the federal lands which are administered by the Bureau of Land Management (Bureau) and the U.S. Department of the Interior (Department).

4. Areas of these federal lands which I have used and continue to use include the Lincoln, Pecos, Cibola, Gila and Carson National Forests, especially the wilderness areas associated with these forests, and adjacent lands

managed by the Bureau. I also use federal lands administered by the Bureau in the San Mateo Mountains, Mount Taylor, the Florida Mountains, and the White Oaks area.

5. I use these federal lands for recreational purposes and for aesthetic enjoyment. My uses include extended overnight camping, backpacking, and day hiking through the mountains, hunting, fishing, picnicing, horseback riding, packing with horses, and driving along scenic roads. The species I hunt include deer, barbary sheep, bear, coyote, elk, antelope, wild turkey and ibex.

6. Another specific area which I frequently visit is the Tent Rocks Picnic Area. My use there is mainly for aestheic enjoyment of that area's scenic rock formations and other vistas.

7. My recreational and aesthetic enjoyment of the above mentioned federal lands largely depends upon their being managed by the Bureau and the Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

8. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

9. I am also aware that the specific federal lands which I use are among the federal lands which were protected by the withdrawals and classifications that were revoked and terminated under the above stated Withdrawal Review Program. These include, but are not limited to,

the Tent Rocks Recreation Area (protected by classification NM 9491 of September 17, 1970, 35 Fed. Reg. 14564, 14565, *unlawfully terminated* by Notice of June 9, 1981, 46 Fed. Reg. 31776, 31777) (*see* appendices I, II, and III attached hereto); areas of Lincoln National Forest (protected by Public Land Order No. 656 of August 15, 1950, *unlawfully revoked* by Public Land Order 5827 of February 20, 1981, 46 Fed. Reg. 7339, 7340); and areas of the Gila National Forest (protected by Secretarial Order of October 4, 1941, *unlawfully revoked* by Public Land Order 6314 of August 17, 1982, 47 Fed. Reg. 35768, 35769).

10. These unlawful actions by the Bureau and the Department have resulted in actual injury to my recreational use and aesthetic enjoyment of federal lands by opening specific areas which I use to the staking of mining claims, oil and gas leasing and development, disposal by exchange and other uses which adversely affect the aesthetic beauty and wildlife habitat potential of these lands.

11. My interest in recreational use and aesthetic enjoyment of the federal lands, and my interest in seeing that the laws pertaining to the preservation and protection of federal lands and their natural resources are complied with, have been adversely affected by the unlawful actions of the Bureau and the Department.

12. My above stated interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 30 , 1988.

/s/ A.L. "Will" Ouellette
A L. (WILL) OUELLETTE

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF PEGGY KAY PETERSON

Declarant, PEGGY KAY PETERSON, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF).

2. On April 7, 1986, I executed an affidavit which was filed in the instant civil action. I hereby incorporate that affidavit herein in its entirety.

3. I continue to reside at 3519 Partridge Lane, Casper Wyoming 82604.

4. I also continue to use the federal lands including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and aesthetic enjoyment as stated in my April 7, 1986, affidavit. In particular, I use these federal lands for hiking, camping, hunting and fishing. I primarily hunt large game including deer and elk which are known to occupy these federal lands.

5. I specifically use the federal lands administered by the Bureau and the Department which were described in the order dated November 22, 1967, (32 Fed. Reg. 16057, 16058) classifying such lands for multiple-use management and segregating such lands from appropriation under the general mining laws.

6. I am aware that the above mentioned classification was unlawfully terminated by order dated April 30, 1984, with respect to these areas of the federal lands which I use. 49 Fed. Reg. 19904. This action by the Bureau and Department unlawfully removed the protection of natural resources afforded by the classification by opening such lands to location under the mining laws in violation of the laws pertaining to the preservation and protection of natural resources on the federal lands.

7. Further, I am aware that U.S. Energy Corporation has filed a mine permit application with the Bureau and Department, (U.S. Energy Application, TFN 2 4/86), which includes a proposal to mine a significant portion of the federal lands which I use for recreational purposes and aesthetic enjoyment.

8. A substantial portion of the lands which I use and which are included in the U.S. Energy permit application are identical to those lands described in the classification order mentioned in paragraph 5 above which was terminated by the order mentioned in paragraph 6 above.

9. My interest in recreational use and aesthetic enjoyment of these specific tracts of federal lands has been adversely affected by the Bureau's and Department's unlawful termination of a protective land classification. Such action, by authorizing the U.S. Energy mine permit

application causes substantial injury to my uses of these federal lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.

10. My interests continue to be fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 28th, 1988.

/s/ Peggy Kay Peterson
PEGGY KAY PETERSON

Supreme Court, U.S.
FILED
DEC 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-628

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

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No. 89-628

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

ARGUMENT

In response to the Brief In Opposition For Respondent National Wildlife Federation (hereinafter Opposition) Petitioners, Mountain States Legal Foundation and the Minerals Exploration Coalition (hereinafter MSLF), respectfully submit the following reply.

I. THIS CASE PRESENTS A CLEARLY FOCUSED ISSUE OF LAW

The Respondent correctly states that the issue in this case is whether the programs and policies of the federal government are justiciable. Opposition at i. As a result, the issue in this case is purely a question of law. Contrary to Respondent's assertion, no factual inquiry is required either: as to the factual sufficiency of the affidavits,[1] Opposition at 19; or as to consideration of the issue of supplementation of Respondent's affidavits, Opposition at 20-22, 10-12.

Clearly, the issue raised in the case at bar – the justiciability of Executive Branch policies and programs – brings to bear the vitally important constitutional question of separation of powers. *Allen v. Wright*, 468 U.S. 737, 759-60 (1984). Despite the importance of the doctrine of separation of powers – it was one of the key building blocks of our Constitution – the Respondent tries to down-play its significance. The Respondent seeks to persuade this Honorable Court that, in essence, the doctrine of separation of powers is an outdated concept from a simpler time that can now be discarded.

Similarly, the Respondent minimizes the burdensomeness of judicial consideration of the merits of this case, which is in reality 814 separate and distinct cases, each with its own set of facts. Opposition at 24. The

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[1] In making this statement, MSLF does not agree that the Court of Appeals was correct in accepting the validity of the Respondent's affidavits in the face of a protective order preventing discovery into the validity of those affidavits. To the contrary, MSLF believes that holding was in error.

Respondent would have this Honorable Court believe that it is of no moment that for 180 million acres of land – an area the size of Texas, Vermont, and New Hampshire – a federal judge would become the federal land manager, deciding as to each of the 814 separate federal actions what should be done with the land in question.

The Respondent argues that the absence of an injunction makes the case minimally burdensome to the agency. Yet, since the dissolution of the injunction in 1988, the Respondent has asked both the District Court and the Court of Appeals to reinstate the injunction. Moreover, it has prayed for a permanent injunction which would have the effect of making the court, rather than the agency, act as manager of the lands. *See* Opposition at 33. This significantly and unconstitutionally burdens both the court and the agency. Clearly, it is this type of burdensomeness that highlights the importance of the doctrine of separation of powers.

II. THE RESPONDENT HAS MISCONSTRUED DECISIONS OF THIS COURT

The Respondent has misconstrued and misapplied this Honorable Court's rule that programs and policies are not justiciable as set forth in *Ashwander v. TVA*, 297 U.S. 288, 324 (1936). The Respondent correctly notes that the broad challenge to the TVA program and policy in *Ashwander* was based on injury associated with a single contract and that this Honorable Court found the broad challenge not justiciable. Opposition at 26.

However, Respondent misapplies *Ashwander* by attempting to distinguish itself from the plaintiff in *Ashwander*. The Respondent would have this Honorable Court believe that the Respondent's attempt to shut down the Withdrawal Review Program is unlike Ashwander's efforts to shut down the TVA program. Opposition at 27-28. The Respondent apparently sees nothing in its programmatic challenge to the entire Withdrawal Review Program that is comparable to *Ashwander's* disallowed programmatic challenge. This is unreasonable and untrue.

To correctly apply *Ashwander*, the injury suffered by Respondent's affiant – Ms. Peterson[2] – must be equated to *Ashwander's* contract injury. In addition, the challenge to the Withdrawal Review Program must be equated to the disallowed programmatic challenge in *Ashwander*. The Respondent could have challenged one of the 814 separate and distinct agency actions by bringing one claim for relief against that single agency action on the basis of Ms. Peterson's affidavit.[3] Instead, the Respondent seeks to do exactly what the plaintiff in *Ashwander* sought to do but was prevented by this Honorable Court from doing: using one injury to gain standing to set aside an entire government program.

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[2] Ms. Peterson's affidavit, by itself, was held sufficient for standing by the Court of Appeals. MSLF Petition, App. 34.

[3] As noted in MSLF's Petition, Ms. Peterson's affidavit relates to only one of 814 unique and separate agency actions listed in the Respondent's Complaint.

The Respondent attempts to distinguish *Ashwander* by asserting that *Ashwander* only precludes litigation where injury is remote and hypothetical. Opposition at 27. The Respondent would have this Honorable Court believe that its alleged injuries are not remote and hypothetical, when in fact that is exactly what they are. There are over eight hundred other agency actions challenged in this suit for which the Respondent has submitted no affidavit documenting any injury whatsoever.[4] Each of these as yet unasserted claims is an example of the remote and hypothetical claims which are barred by the rule of *Ashwander*.

The Respondent misinterprets *Ashwander's* requirement that to be justiciable an agency action must have "fruition in [agency] action of a definite and concrete character." It asserts that the requirement is met and the entire program may be challenged if a plaintiff can merely show implementation of the program. Opposition at 28. If this were true, then the plaintiff in *Ashwander* could have challenged the program by merely presenting its one contract injury and pleading that the TVA program was underway – which no doubt it was. This is not reasonable.

It is also unreasonable to equate – as the Respondent does – the slight injury of Ms. Peterson – or all the Respondent's affiants, for that matter – to the alleged dangers of the breeder reactor demonstration facility considered by the court in *Scientists Institute for Public*

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[4] To show injury from the 814 separate agency actions, Respondent has submitted a total of six affidavits; of which the Court of Appeals considered only Ms. Peterson's.

Information, Inc. v. Atomic Energy Comm'n (SIPI), 481 F.2d 1079 (1973). *See* Opposition at 27. The action complained of by Ms. Peterson is an infinitesimal part of the Withdrawal Review Program, while the breeder reactor demonstration facility of *SIPI* constituted the major part of the LMFBR program and most probably was the reason why the court considered the LMFBR program to be of "definite and concrete character."[5]

The Respondent's interpretation of *Allen v. Wright* is also flawed. It argues that the precedent of *Allen v. Wright*, precluding standing, does not apply since "it makes little sense either for coherent management of the federal lands or for the exigencies of the federal court system to force multiple lawsuits challenging the same violations of the law." Opposition at 30. This argument begs the question before this Honorable Court. Respondent's argument makes sense only if this Honorable Court wishes to uphold 'coherent *judicial* management of the federal lands.' That is precisely the issue of this case – whether federal land management is a power assigned to the Executive and Legislative Branches or to the courts. *Allen v. Wright* does not facilitate efficient judicial administration of an agency program, it precludes judicial administration of the program altogether.

The Respondent cites a number of other cases as examples of adjudication of Executive Branch policies

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[5] By ignoring the role of the demonstration facility in *SIPI*, the Respondent chooses to ignore the character of the LMFBR program and distorts MSLF's argument. *See* Opposition at 27 n20.

and programs. None of these cases directly addressed the issue presented in this case. Some addressed sufficiency of rule-making or adjudication in single decisions which initiated programs,[6] one addressed associational standing,[7] and one addressed mootness.[8]

Respondent's unsupported arguments notwithstanding, this Honorable Court's prior decisions limit the role of courts to review policies and programs of the Executive Branch. The decision of the Court of Appeals conflicts with those decisions.

CONCLUSION

MSLF admits that the courts have had difficulty applying the holding of this Honorable Court in *Allen v. Wright*. The result has been a confusing array of lower court decisions on the issue at bar.[9] This confusion is

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[6] *E.g., Watt v. Energy Action Education Foundation*, 454 U.S. 151 (1981); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988); *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988).

[7] *Automobile Workers v. Brock*, 477 U.S. 274 (1986).

[8] *Blum v. Yaretsky*, 457 U.S. 991 (1982).

[9] One correct application of *Allen v. Wright* was Judge Bork's decision denying standing to the plaintiff in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 807 (D.C. Cir. 1987) (Partially quoted in Opposition at 23 n16). However, even this decision recognized that this Honorable Court had not explicitly addressed this issue:

(Continued on following page)

exactly the reason why this Honorable Court should grant the writ and review the Court of Appeals' decision.

Respectfully submitted,

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(Continued from previous page)

> Thus, as in *Allen v. Wright*, a court could not recognize appellants' standing . . . regardless of the factual showing they might have made, without running afoul of the structural principle of separation of powers.
>
> Appellants have therefore failed to establish the requisite causation. But because the Supreme Court has never said explicitly that the separation of powers concept leads it to deny causation where it otherwise might be found if it were a purely factual question, it is appropriate to examine the prudential principles that bear on appellants' standing.

Id. As a result of this uncertainty, the issue at bar is like a reserved question. The instant matter presents the ideal opportunity to address this question.

No. 89-628
No. 89-640

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IN THE

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OCTOBER TERM, 1989

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vs.

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AND

No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

vs.

NATIONAL WILDLIFE FEDERATION,
Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN MINING CONGRESS

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Amicus Curiae adopts the Appendix filed by the Federal Petitioners in Docket 89-640. References to pages in that Appendix shall be stated as "App." followed by the page number(s).

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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN MINING CONGRESS

INTRODUCTION

On July 15, 1985, the National Wildlife Federation ("NWF") filed a suit against the United States Department of the Interior complaining that the Bureau of Land Management ("BLM") was improperly terminating a multitude

of land classification and withdrawal orders on lands administered by the BLM, and claiming that the termination of these orders would result in disposal or development of vast acreages of public lands. NWF asked for immediate injunctive relief to (1) freeze land classifications and withdrawals as of their status on January 1, 1981 (some four and one-half years earlier) and (2) enjoin the BLM from taking actions inconsistent with the then existing classifications and withdrawals. In essence, NWF seeks to reorder an entire government program.[1]

Battlelines were drawn immediately around the standing issue. In support of its standing to bring the suit, NWF submitted only the thinnest of evidence and, on the basis of this, sought to prohibit uses on more than 180,000,000 acres of federal public lands. The District Court initially upheld the evidence of standing as sufficient to survive a motion to dismiss and granted the preliminary injunction.[2]

On appeal, the Court of Appeals, in a split decision, upheld the District Court's finding that enough had been alleged by NWF as to its standing to survive the motion to dismiss (*Burford I* at 312–314; App. 48a–57a)[3] and that the

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[1] *National Wildlife Federation v. Burford*, 676 F. Supp. 271 (D.D.C. 1985) (App. 119a–136a). See also *National Wildlife Federation v. Burford*, 676 F. Supp. 280 (D.D.C. 1986) (App. 137a–150a).

[2] *National Wildlife Federation v. Burford*, 676 F. Supp. 271, *supra*, at 277 and 279 (App. 130a and 136a).

[3] *"Burford I"*, the first opinion of the Court of Appeals in this case, is reported as *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (App. 38a–115a). A vigorous dissent by Circuit Judge Williams in *Burford I* criticized the granting of the preliminary injunction on the weak proofs offered in support of standing:

> The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres — nearly one-fourth of all federal lands and more than half of the public lands managed by the Bureau

District Court did not abuse its discretion in granting the preliminary injunction (*Burford I* at 327; App. 84a–85a).[4] Later, the District Court undertook consideration of the case on cross-motions for summary judgment and granted judgment against NWF on the basis of lack of standing.[5] The Court of Appeals reversed this judgment on the grounds that it had already found sufficient standing in *Burford I* and that was now the law of the case. (*Burford II* at 432–433; App. 18a–20a).[6] It is from *Burford II* that the present Petitions for Writ of Certiorari were filed.

> of Land Management ("BLM"). It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests – much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

835 F.2d at 327 (App. 85a).

[4] The Court of Appeals denied the motion for rehearing urged after its *Burford I* decision in *National Wildlife Federation v. Burford*, 844 F.2d 889 (D.C. Cir. 1988). There the Court of Appeals noted (at page 889; App. 117a–118a; emphasis added):

> It has been over two years since the preliminary injunction was issued. As we stated in our opinion, "[t]his is a serious case with serious implications." 835 F.2d at 327. We noted then, and continue to believe, that some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force. *In addition, we are aware that the district court injunction has placed on "hold" for over two years a complex governmental effort to review and adjust its classifications of vast tracts of land. It is also beyond dispute that countless parties are affected by the uncertainties associated with the unsettled status of these lands.* For these reasons, we believe that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below.

[5] *National Wildlife Federation v. Burford*, 699 F. Supp. 327 (D.D.C. 1988) (App. 26a–37a).

[6] "*Burford II*," the Court of Appeals opinion of which review is

Amicus Curiae American Mining Congress, with the permission of all parties in both petition dockets, files this Brief in support of both of those Petitions.

INTERESTS OF *AMICUS CURIAE*

The American Mining Congress is a non-profit corporation of the State of Colorado, which serves as a trade association composed of (1) producers of most of America's metals, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry.

Congress has repeatedly pronounced as a national policy that the domestic mining industry is essential to the country's security and prosperity, 30 U.S.C. 21a, 1602–1605, 1801(a), and that the public lands should be managed in a manner to implement that policy, 43 U.S.C. 1701(a)(12). It appears to *Amicus Curiae* that NWF harbors a different view, that mining activity on public lands is contrary to the nation's interests. That view certainly was the essence of NWF's demand for the preliminary injunction.[7]

The 180,000,000 acres of land which is subject to this suit constitutes more than one-half of all lands administered by the BLM and forty-four percent of all lands owned by the federal government in the western United States, excluding Hawaii and Alaska. Most of the known domestic resources of metallic minerals, other than iron, are situated in the West and there is a strong probability that the public land areas of the West hold greater promise for future mineral discoveries than any other region. Public Land Law

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sought by these Petitions, is reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989) (App. 1a–25a).

[7] See *National Wildlife Federation v. Burford*, 676 F. Supp. 271, *supra*, at 279 (App. 135a).

Review Commission, *One Third of the Nation's Land,* 121, 122 (1970).

Already the mining industry's mineral exploration activities in the western United States have been affected by this case, just by virtue of the suit having been filed and then by the issuance of the preliminary injunction. If NWF ultimately prevails in imposing its views on the BLM, the public lands available for mineral supply will be reduced drastically. The mining industry (and the resulting benefits to the prosperity and security of the nation) is largely dependent upon public land mineral resources. Thus, *Amicus Curiae* is keenly interested in the outcome of this case.

SUMMARY OF ARGUMENT

The Court should grant certiorari because the *Burford II* opinion of the Court of Appeals, in upholding NWF's claim of standing, ignores the constitutional limits on the role of the federal judiciary. The essence of this dispute is whether NWF should be permitted to use the federal courts to mold the national policy to reflect NWF's privately held opinion that all of the public lands which are subject to this suit should be protected from mining. This is a political question for Congress to decide, not a "case or controversy" for the courts to decide. If NWF wishes to proceed with its quest, it should do so by bringing its "argument" to Congress and the executive branch of the government. Accordingly, *Amicus Curiae* respectfully submits, this suit is barred by considerations more fundamental than the issue of standing. If this Court agrees that NWF is asking the courts to intrude on the representative branches of government, then it is not necessary to reach the question of whether NWF "lined up enough ducks" on the standing issue.

Furthermore, this Court will find, as is pointed out in the briefs filed by the Petitioners, that the standing showings offered by NWF are defective under even the most liberal cases.

And, finally, to resolve the concerns of NWF, the District Court will be forced to review and administer an entire governmental program rather than to carry out a proper function of the courts: determining the propriety of a particular federal agency action. NWF's goal in forcing the program review is to impose on the country its narrow view of the public good. The very fact that this suit was filed has disrupted the BLM's conduct of its business, as well as the business of third parties, such as those in the mining industry, which cannot operate without stability in the government's programs and policies concerning public lands. Review of federal agency programs is not the proper use of the federal judiciary.

ARGUMENT

A. NWF's Suit Should be Dismissed as Not Justiciable Because it Asks the Court to Ignore the Separation of Powers Doctrine.

No matter what is thought of NWF's claims to have satisfied the required showings for standing and no matter what is thought of the minimal requirements to establish standing under cases like *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Defenders of Wildlife, Friends of Animals v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), this case is outside of the universe of cases that may properly be undertaken by the federal courts. This case involves an entire governmental program. Congress established that program in 1976 by requiring the Secretary of the Interior to review the withdrawals of the public lands at question in this case to determine which withdrawals should be continued or revoked, and authorized the Secretary to terminate those administratively created withdrawals which are no longer needed. Congress placed the deadline for the completion of this withdrawal review program at October 22, 1991. 43 U.S.C. 1714(l).

This withdrawal review program is a political matter, not a justiciable question. The separation of powers doctrine requires the federal courts to limit their authority to justiciable questions and keep out of the political aspects of government.[8] *Allen v. Wright,* 468 U.S. 737 (1984).

It is submitted that the separation of powers doctrine is not a standing concept.[9] Standing focuses on whether the particular plaintiff properly brings a case within the judicial limits of Article III. The separation of powers doctrine, though also rooted in Article III, focuses on the justiciability of the issue. If, in order to satisfy the plaintiff, the federal court must encroach upon the realm of the legislative and/or executive branches of the government, then the separation of powers doctrine bars the suit. *Allen v. Wright, supra,* at 759. Whether it is labelled a question of standing or not, the essential and underlying inquiry is, under our system of the separation of powers, should the courts undertake the case.

In *Allen v. Wright, supra,* 759–60, this Court stated:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that the respondents' alleged injury "fairly can be traced to the challenged action". . . . That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of the law, but the particular programs agencies establish to carry out their legal obligations. *Such suits, even when premised on allegations of several instances of violations of*

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[8] This issue was raised before the Court of Appeals, but is not squarely addressed in the *Burford II* decision.

[9] An analysis of this principle is provided in Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions,* 76 Cal. L. Rev. 1061, 1091–1093 (1988).

> *the law, are rarely if ever appropriate for federal-court adjudication.*

(Emphasis added.)

The very situation this Court in *Allen* warned against is the situation in this case. NWF has not complained of a specific violation of law which has in fact harmed one of its members. Instead, though complaining that there are general violations of the law, NWF in reality wants to halt an entire governmental program.

In language which is verbatim applicable to this case, this Court in *Allen* said:

> When transported into the Art III context, [the principle that government be granted the widest latitude in the dispatch of its own internal affairs], grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. *The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the laws be faithfully executed."* U.S. Const., Art. II, § 3. *We could not recognize respondents' standing in this case without running afoul of that structural principle.*

468 U.S. at 761; emphasis added.

The intrusion upon the separation of powers has been extended further by Congress itself broadening the role of the judiciary by attempting to grant universal standing in

some environmental legislation, such as in the Clean Air Act, 42 U.S.C. 7607(d), and in the Clean Water Act, 33 U.S.C. 1365. The following observations have been made about Congress purporting to grant standing beyond the bounds of the Constitution:

> Justice Scalia believes that standing is ultimately related to separation of powers concerns. The power of the Congress to expand standing is, therefore, inescapably limited. In Scalia's view, congressional approval, express or implied, to expanding standing "cannot validate judicial disregard" for the boundaries that exist between branches of government.
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> * * *
>
> A universal grant of standing, even though an "acquiescence" of Congress to judicial intervention, forces courts to hear the claims of the majority because plaintiffs need not allege palpable injuries that set themselves apart from the general public. . . . The democratic process that inheres in the executive and legislative branches, and not the undemocratic process that inheres in the courts, should resolve and protect the interests of "all-inclusive" classes of citizens.[10]

In this case, NWF is not suing on the basis of legislation where Congress made a universal grant of standing. It should be readily apparent, therefore, that if special interest

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[10] Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing For The Uninjured Private Attorney General?*, 16 Boston College Environmental Affairs L. Rev. 283, 304–305 (1988–1989); footnotes omitted; referring to Justice Scalia's *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983).

groups should not be allowed to distort the judiciary's role even where Congress has "authorized" it by granting universal standing, then special interest groups should certainly not be allowed to do so by cases such as this one without congressional encouragement.

More harm is done by allowing actions such as NWF's suit than simply an injudicious stepping on the toes of other branches of government. It has been observed that when special interest groups, such as NWF, succeed in convincing a court to undertake review of a governmental program, they obtain an inappropriate advantage in terms of greater clout and more attention than is warranted vis-a-vis all the other interests which should be considered in the formulation of public policy.[11] This is because special interest advocates are not primarily concerned with presenting all of the issues for the court to decide. Instead, they are primarily concerned, like anyone else contemplating a lawsuit, with presenting only the issues which will allow them to prevail in the matter under dispute. The very fact the special interest group has convinced the court to take the case indicates that group's notion of public policy has caught the court's attention and, perhaps, the court has allowed itself to become a vehicle or even a champion of the special interest group's view of public policy. (Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy,* pp. 63–64, (1989).)[12] Rabkin states that permitting the special interest group lawsuits against administrative agencies is "essentially a means by which courts grant particular private advocates privileged claims on the conduct of public policy." Rabkin, *supra,* at 64.[13]

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[11] The proper forum for special interest groups to demand attention for their agenda is through the more deliberate and democratic legislature.

[12] This Court has admonished the federal judiciary to refrain from such judicial activism. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

[13] In his dissent in *Burford I*, Circuit Judge Williams charged that

Further, Rabkin submits, when special interest groups are able to intimidate administrative agencies with threats of lawsuits, then the administrative agencies are inordinately influenced in their policy decisions by the promptings and complaints of these advocacy groups. And, if lawsuits proceed, then the advocacy groups can invoke legalistic rationales to protect their preferred policies from reconsideration or adjustment over time. (Rabkin, at 63–64 and 270.)

Amicus Curiae submits that the concerns expressed by Rabkin are very real. If NWF is successful in proceeding with this case, then the ability of the BLM to make judgments based on the many relevant policy considerations will be limited, with undue attention being given to NWF's view. The national policy to manage public lands in a manner which fosters the domestic mining industry is, thus, thwarted.

The existence of cases in which claims such as NWF's have been allowed to proceed without strict insistence on meeting the constitutional and traditional requirements for a "case or controversy"[14] does not force this Court or any federal court to further extend that ill-advised practice to the extent sought by NWF in this case.[15] Special interest

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undue influence for the environmentalists' agenda was the very result in this case:

> The injunction . . . makes no effort to minimize the *aggregate* harm to the public interests in both environmental preservation and alternative activities: the district court has allowed environmental interests, however weak and however trivially they may be at risk as to particular tracts, to sweep the other interests off the board.

835 F.2d at 340 (App. 114a–115a).

[14] For example, the *United States v. SCRAP* case, *supra*.

[15] Some legal commentators have observed that the courts are taking a more critical look at standing cases. For example, see Alpert, *supra*, at 305.

groups may still, and properly should, pursue their agenda in the political realm of government.

This case exemplifies a third mischief that springs from involving the courts in the administration of governmental programs. Here, the already overburdened judiciary is being asked to assume an enormous and time-consuming task which, constitutionally, the judiciary should avoid. The task NWF asked the District Court to undertake was awesome. NWF's goal was not to challenge indentified "wrongs," but, rather, was to have the Court perform the work of the BLM while wearing NWF-supplied blinders. Instead of selecting one or even several BLM classification or withdrawal decisions on land which it could precisely locate and for which it might produce an injured member who recreated on that land, NWF challenged the entire withdrawal review program by including hundreds of Federal Register notices of BLM actions (NWF's Amended Complaint, paragraph 18) and neither precisely located them for the Court (*Burford I* at 329 and 337; App. 89a–90a and 107a–108a), nor produced members who could claim injury. As the case progressed, NWF was forced to concede that some of the listed actions were environment enhancing even in NWF's view. (*Burford I* at 337; App. 108a). And as pointed out in the briefs filed by the Petitioners, the District Court had monumental difficulties during the period the preliminary injunction was in effect.[16]

And there is a fourth mischief in these suits that is particularly apparent in this case. Allowing an entire program to be challenged reduces, if not nullifies, the ability

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[16] As noted at pages 7–8 of the Petition filed by the federal Petitioners in Docket 89–640, several modifications of the preliminary injunction were necessitated to limit its original scope. In at least one instance, NWF itself was constrained to ask for relief. Congress, at the behest of affected parties, legislated other limits on the effect of the preliminary injunction.

of third parties to conduct their business with the government. The mining industry is dependent on its statutory right to explore for and produce minerals on public lands. Until the industry knows reliably what will become of the BLM's classification and withdrawal review programs, the mining industry cannot risk the huge monetary investments necessary to conduct mining activities. If, as Congress has declared, the national policy favors an orderly domestic mining program, then the mining industry must be allowed to rely on governmental programs. (See the statement of the Court of Appeals quoted at footnote 4, *supra*, wherein that court recognized the disruption caused to the ability of third parties to conduct business.)

B. NWF's Suit Fails Under the Most Liberal of Standing Cases.

Standing jurisprudence is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief. *National Wildlife Federation v. Hodel,* 839 F.2d 694, 703-704 (D.C. Cir. 1988). The courts have developed guidelines for the case-by-case testing of standing issues. First, the suit must meet the "case or controversy" requirement of Article III of the Constitution. *Warth v. Seldin,* 422 U.S. 490 (1975); *NWF v. Hodel, supra.* Second, the suit must survive self-imposed "prudential limits" on the courts' powers. *Warth, supra; NWF v. Hodel, supra.*

Even though these same constitutional and prudential tests underlie virtually all the many federal court pronouncements on standing, the pronouncements are hard to reconcile. But, *Amicus Curiae* suggests, there is no need in this case to attempt to reconcile the "conservative" standing cases with the "liberal" ones. The Petitioners have pointed out in their briefs that NWF's showing of standing failed to meet even the most liberal of the standing decisions.

Amicus Curiae, however, wishes to bring to this Court's attention that there is a case, also decided by the

District of Columbia Circuit, which is substantively irreconcilable with the present case. *See Wilderness Society v. Griles,* 824 F.2d 4 (D.C. Cir. 1987). That case involved a challenge by the Wilderness Society and the Sierra Club to a BLM policy decision not to charge submerged lands against the grant of acreage entitlements for Alaska and Alaskan natives. In fact *Griles* was decided by some of the same Circuit Judges who decided *Burford II.* In the *Griles* case, however, it was held that affidavits of Society members, in which it was claimed that the members visited federal lands throughout the State of Alaska, were *insufficient* to support standing. The Court of Appeals reasoned that members failed to name specific lands they intended to visit which lands would be taken out of federal ownership by the challenged BLM policy.

The very same flaw in standing proof defeats this case. NWF's member affidavits claimed nothing more specific than recreating "in the vicinity of" only some of the enormous expanses of federal land affected by this suit. They did not point to specific tracts which would be opened to other users, thereby injuring the members' enjoyment of the environment undisturbed. This Court is often asked to grant certiorari to resolve a conflict in decisions between Circuits. Here, certiorari should be granted to resolve a conflict within a Circuit.

Despite all the procedural entanglements and problems over what standard of review was to be applied at any particular stage of this case, what happened here is relatively simple: NWF tested the limits of a claim to standing. The District Court found that NWF pushed too far. The Court of Appeals, misled by a notion of law of the case, reversed. Unfortunately, in addition to announcing that the appeal was decided on the basis of law of the case, the Court of Appeals, in a published opinion, made lengthy comments to the effect that the Court would countenance standing proofs even as thin as NWF's. Even if these comments are viewed as *dicta,* they will necessarily confuse the law of standing. The wisdom of this Court is called upon to instruct

the Court of Appeals, and, indeed, all federal courts, that the courts of this nation should not be in the business of reviewing entire public programs, especially where the activities claimed by the plaintiff's members are located no more precisely than "in the vicinity" of a few of the huge tracts of federal land they seek to preserve.

The vastness of the public lands requires that direction for their management be provided initially by broad programs, such as the withdrawal review program, to be implemented by individual actions on specific land areas. If a party is injured by such a specific action, that party may have standing to seek redress in the courts for that action, but not for the entire program guiding other actions which do not affect that party.

CONCLUSION

The Petitions for Writ of Certiorari should be granted.

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Nos. 89-628 & 89-640

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

and

MANUEL LUJAN, JR., *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF AMERICAN FARM BUREAU FEDERATION AND WYOMING FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Farm Bureau Federation (AFBF) and Wyoming Farm Bureau Federation (WYFB) hereby

respectfully move to file the attached brief *amicus curiae* in support of Mountain States Legal Foundation and Manuel Lujan petitioners for *certiorari* in the above captioned case. The consents of the attorneys for the petitioners have been obtained. The consent of the attorney for the respondent was requested but denied.

The interest of the Farm Bureau in this case arises from the fact that many Farm Bureau members in the western states are adversely affected by restrictions on land managers imposed in the case at bar. Additionally, Farm Bureau members have been adversely impacted by litigation challenging government programs and policies in other areas including public land grazing administration, argricultural chemical regulation and water regulation.

The AFBF is the largest general farm organization in the United States. It has member state organizations in all 50 states (including Wyoming) and Puerto Rico, representing the interests of more than 3.6 million member families. The interests of AFBF and WYFB should be considered by this Court in making the decision to grant the petitioned writ.

Respectfully submitted,

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November 1989

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF AMERICAN FARM BUREAU FEDERATION AND WYOMING FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

The American Farm Bureau Federation and Wyoming Farm Bureau Federation respectfully submit this brief

amicus curiae in support of Mountain States Legal Foundation and Manuel Lujan, petitioners for *certiorari*.

INTEREST OF AMICUS CURIAE

1. The American Farm Bureau Federation (AFBF) of Park Ridge, Illinois is a nonprofit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF, has member state organizations in all 50 states (including Wyoming) and Puerto Rico, representing the interests of more than 3.6 million member families.

2. The Wyoming Farm Bureau Federation (WYFB) is a voluntary, non-profit, general farm organization incorporated under the laws of the State of Wyoming, representing more than 8,000 families. Its purpose is to represent, service and protect the interests and rights of farmers and ranchers in Wyoming.

3. Farm Bureau members have a direct and vital interest in the outcome of this case. The orderly management and use of federal lands, especially in the western region of the United States, is of paramount importance to member farmers and ranchers whose private lands lie adjacent to and are often tied economically to such federal lands.

STATEMENT OF THE CASE

Amicus Curiae adopts petitioners' statements of the case.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' STANDING RULE ALLOWS SERIOUS DISRUPTION OF GOVERNMENT PROGRAMS UPON WHICH FARM BUREAU MEMBERS MUST RELY

The Court of Appeals' decision is the latest of a long series of suits in which parties with the slightest interest in a problem claim standing to judicially challenge far reaching government programs. The result has been serious disruption and potential devastation for those that rely on the programs.

Of major importance to the Farm Bureau's Western Region members is the public lands grazing program. For generations families have built ranches around the right and ability to graze cattle on the federal lands. Unfortunately, because of continued federal administrative control of those grazing rights, the very right of western ranchers to hold the grazing rights – and thus continue their livelihoods – has been subjected to judicial review at the behest of special interest litigating groups. In the case at bar, standing has been based on the slightest aesthetic interest in the federal lands.

For example, the Natural Resources Defense Council (NRDC) sued in the Eastern District of California to set aside the Bureau of Land Management's Experimental

Range Stewardship Program. *Natural Resources Defense Council, Inc., v. Hodel*, No. Civ. S-84-616 (E.D. Cal. Sept. 3, 1985). By using an extremely narrow construction of the Public Rangeland Improvement Act, 43 U.S.C §§ 1901-1908 (1982), the court struck down a program designed to use incentives to improve range conditions. The Farm Bureau respectfully submits that it is not appropriate for single issue plaintiffs to be granted standing to attack an experimental program designed to better the efficiency of Executive branch management.[1]

If the court had enforced the rule that programs are not justiciable, then BLM may have been able to develop a better range management system. Instead, the court presumed the failure of the BLM's program and dictated the content of the program to the agency. Moreover, such judicially dictated policy ultimately frustrates the policy of Congress to improve grazing conditions. *See* Huffaker and Gardner, *Rancher Stewardship on Public Ranges: A Recent Court Decision*, 27 NAT. RES. J. 887 (1987) (describing the deleterious effect of judicial intervention in this program).

The NRDC again sued in the Eastern District of California[2] to set aside an executive order setting grazing fees

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[1] Authority for the stewardship program is found at 43 U.S.C. § 1908 (1982).

[2] The above two cases are not the only ones brought in the Eastern District of California. *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985), set aside an important wilderness study program of the Department of the Interior.

for all the public lands.[3] *Natural Resources Defense Council v. Hodel*, No. Civ. S-86-548 (E.D. Cal.). The injury claimed for standing was aesthetic damage caused by a chain of events that allegedly resulted from fees that the NRDC claimed were too low. The court was presented with thousands of pages of economic and technical data and asked to decide the fate of the public lands grazing program, and the court asserted its authority to do so. Ranch families across the West must not live in fear of economic ruination at the hands of single interest claimants who have no economic risk or loss of property rights at stake.

Grazing and grazing fee issues are properly before Congress and congressional oversight committees. The agencies have thousand of personnel to manage the grazing program. Both of these branches of government are ultimately responsible to the public. The environmental groups and the members of the Farm Bureau are constantly arguing their points to these co-equal branches of government. The process is a slow one, as it should be since the survival of western ranch families is at stake. This program has been authorized, funded, and overseen by Congress. The Executive is responsible for administration. There is no need for reshaping by litigation only to accommodate the policy goals of environmental litigants.

Registration and de-registration of agriculture chemicals is of great importance to Farm Bureau members throughout the United States. America's farmers are

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[3] Grazing fees are the rentals charged for grazing on the public lands.

proud of their role in providing abundant and wholesome food for the nation and the world. The chemicals that have played an important role in agriculture cannot be removed or restricted from the market lightly. Both Congress and the Executive have processes whereby those concerned about chemicals can air their concerns and receive appropriate action. Again, the judiciary should not be called upon repeatedly to decide such technical and politically charged questions asserted by environmental litigants.

Yet the judiciary has played a major role – perhaps *the* major role – in shaping the agriculture chemical policies and programs of the Executive. A commentary describes how a series of court decisions rewrote the procedural provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1982), so as to define the substantive content of the program. MacIntyre, *A Court Quietly Rewrote the Federal Pesticide Statute: How Prevalent Is Judicial Statutory Revision?*, 7 LAW & POLICY 249 (1985).

Standing for pesticide cases is in reality based on a harm to the public at large. Such harm is at least as diffuse as the theoretical harm to respondent's member Ms. Peterson in the case at bar. Ms. Peterson might have her aesthetic appreciation of 5,000 acres in Wyoming injured if someone decides to mine there. Likewise, a plaintiff in a pesticide case might contract cancer thirty years from now. Both of these harms are more akin to the injury to taxpayers where this Court has long denied standing. *Frothingham v. Mellon*, 262 U.S. 447 (1923). As in taxpayer cases, this Court should defer to the elected branches of government.

II. FARM BUREAU MEMBERS WHO ARE NEIGHBORS TO THE PUBLIC LANDS ARE DIRECTLY AND ADVERSELY AFFECTED BY THIS SUIT

Apart from the far reaching implications to major government programs upon which Farm Bureau members must rely, this suit directly affects many Farm Bureau members. Many of the western members of the Farm Bureau are neighbors to the public lands. Often historic land ownership patterns have evolved in ways that are inefficient for both the federal land management agencies and the neighboring farms and ranches. To increase efficiency of both public land and private lands, federal land managers and neighboring private owners frequently trade land.

By allowing this suit to be heard, the court placed many completed trades in jeopardy and blocked may others during the time a preliminary injunction was in place. Even now, those trading land must worry that the court or agencies will undo land exchanges.[4]

Hundreds, or perhaps thousands, of land exchanges were blocked on the 180,000,000 acres of federal land involved in this suit.[5] Almost all of those exchanges were

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[4] Section 10 of the Federal Land Exchange Facilitation Act, Pub. L. 100-409, 102 Stat. 1087 (1988) (codified at 43 U.S.C. § 1723 may provide some relief for a few larger future exchanges.

[5] It is impossible to determine the number since many potential applicants were told orally that exchange was impossible on affected lands.

benign to the respondent. Many exchanges, such as those to enhance wildlife habitat, were beneficial to the respondent. The judiciary should not be called upon to block exchanges in all western states based on one person's objection to possible mining damage in one 5,000 acre area in Wyoming.

Land exchanges, and many of the other routine day to day management concerns on the 180,000,000 acres can only rationally be handled by the Executive branch which has the knowledge and staff to handle the thousands of matters that arise. The judicial management of the lands in the case at bar has caused widespread interference with the day to day business relations of Farm Bureau members and federal land managers.

CONCLUSION

The founding fathers wisely assigned policy-making to the Legislative and Executive branches of government. The Executive is intended to have flexibility to efficiently execute the laws Congress passes. The Constitution restricts the Judiciary to resolving actual cases and controversies. Over the past decades the Judiciary has lost sight of this restriction and judicial policy making has seriously impacted the federal programs upon which Farm Bureau members rely. Judicially created policies have hurt farmers in their legitimate use of the public

lands, regulated chemicals, regulated waters, and numerous other objects of government regulation.[6]

The Farm Bureaus urge this Court to grant the writ and examine the role of the judiciary to review programs and policies of federal agencies.

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November 1989

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[6] The great importance of the issue raised in this case to many areas of government and society is set forth at length in J. RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989).

No. 89-628
No. 89-640

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-628

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN MINING CONGRESS

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BRIEF *AMICUS CURIAE* OF AMERICAN MINING CONGRESS

INTEREST OF *AMICUS CURIAE*

American Mining Congress (a Colorado non-profit corporation) is a trade association composed of (1) producers of most of America's metals, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering, consulting, and financial firms and institutions that serve the mining industry. Because of the wide-ranging and negative impact of NWF's suit on the mining industry, the American Mining Congress is keenly interested in the outcome of this case. This *Amicus Curiae* supports Secretary of the Interior Manuel Lujan, Jr., Director of the Bureau of Land Management Cy Jamison, the Department of the Interior, and Mountain States Legal Foundation in this case.

INTRODUCTION AND PROCEDURAL HISTORY

The Withdrawal Review Program ("the Program") was mandated by Congress in the Federal Land Policy and Management Act of 1976 ("FLPMA"). FLPMA requires the Secretary of the Interior, by October 21, 1991, to conduct and complete a review of withdrawals[1] of public lands administered by the Bureau of Land Management ("BLM") and authorizes the Secretary to terminate withdrawals (other than those made by Congress). 43 U.S.C. 1714(l). Congress noted that administrative restrictions on public land use had increased and there had been a failure to examine past withdrawal actions to determine their continuing value. H.R. Rep. No. 1163, 94th Cong., 2d Sess. at 19 (1976). Accordingly, Congress established the Program to correct this problem of excess withdrawals.

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[1] FLPMA defines a "withdrawal" as "withholding an area of federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws . . . ." 43 U.S.C. 1702(j).

On July 15, 1985, National Wildlife Federation ("NWF") filed a suit against the United States Department of the Interior claiming that under the Program the BLM was improperly terminating more than 788 land classification and withdrawal orders on lands administered by the BLM. NWF complained that the termination of these orders could interfere with the enjoyment of the lands by NWF members. NWF prayed for immediate injunctive relief to (1) freeze land classifications and withdrawals as of their status on January 1, 1981 (a date four and one-half years prior to NWF's filing of the suit) and (2) enjoin the BLM from taking actions inconsistent with the classifications and withdrawals existing in 1981. Then, with the injunction in place, NWF would have the District Court require the BLM to repeat a multiple series of land planning studies and prepare an environmental impact statement ("EIS") on each individual land classification termination and land withdrawal revocation, an EIS on the cumulative effect of those actions, and an EIS on the Program itself. The effect of the relief sought by NWF would be to perpetuate indefinitely the withdrawals and classifications and, simultaneously, exclude virtually every land use, all contrary to Congress' purpose in establishing the Program.

The 180,000,000 acres of public land on which this NWF suit would exclude all resource development constitute more than one-half of all lands administered by the BLM and forty-four percent of all lands owned by the federal government in the western United States, excluding Hawaii and Alaska. Most of the known domestic resources of metallic minerals, other than iron, are situated in the western United States and there is a strong probability that the public land areas of the West hold greater promise for future mineral discoveries than any other region. Public Land Law Review Commission, *One Third of the Nation's Land*, 121, 122 (1970).

Congress has pronounced as a national policy that the domestic mining industry is essential to the United States' security and prosperity, 30 U.S.C. 21a, 1602–1605,

1801(a), and mandated that the public lands be managed in a manner to implement that policy, 43 U.S.C. 1701(a)(12). If NWF succeeds in freezing all economic uses on these vast areas of public lands, the resource base for mineral supply to this nation will be reduced drastically. Thus, the relief NWF seeks in this suit would be absolutely contrary to Congressional policy and to the nation's interests.

In support of its claim to have standing to make this challenge, and as evidence of the extent to which its members use this public land, NWF submitted affidavits from two members who claimed to recreate in the vicinity of certain public lands subject to the Program. (App. 187a–192a.) On the basis of these two affidavits, NWF would prohibit all but environmentalist uses on the 180,000,000 acres of federal public lands in question. The District Court initially upheld the evidence of standing as sufficient to survive a motion to dismiss and granted the preliminary injunction.[2]

The Court of Appeals, in a split decision, found that the District Court did not abuse its discretion in granting the preliminary injunction, *Burford I,* at 327 (App. 84a–85a)[3], and upheld the District Court's finding that enough had been alleged by NWF as to its standing to survive the motion to dismiss. *Burford I,* at 311–314 (App. 48a–57a). Circuit Judge Williams, however, filed a vigorous dissent criticizing the granting of the preliminary injunction on NWF's slim proofs.[4] And, in a subsequent opinion

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[2] *National Wildlife Federation v. Burford,* 676 F.Supp. 271, 277, 279 (D.D.C. 1985) (App. 119a–136a, 130a and 136a). *See also National Wildlife Federation v. Burford,* 676 F.Supp. 280 (D.D.C. 1986) (App. 137a–150a).

[3] "*Burford I,*" the first opinion of the Court of Appeals in this case, is reported as *National Wildlife Federation v. Burford,* 835 F.2d 305 (D.C. Cir. 1987) (App. 38a–115a).

[4] In his dissent Circuit Judge Williams stated:

denying motions for rehearing, the Court of Appeals expressed its concern about the serious ramifications of this case and the fact that it had proceeded thus far on only cursory showings presented by NWF.[5] Subsequently, when the District Court undertook more deliberate consideration of the case on cross-motions for summary judgment, it granted judgment against NWF on the basis of lack of standing,[6] specifically finding that the NWF member affidavits were insufficient.

> The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres – nearly one-fourth of all federal lands and more than half of the public lands managed by the [BLM]. It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests – much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

835 F.2d at 327 (App. 85a).

[5] The Court of Appeals noted (emphasis added):

> It has been over two years since the preliminary injunction was issued. As we stated in our opinion, "[t]his is a serious case with serious implications." 835 F.2d at 327. We noted then, and continue to believe, that some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force. *In addition, we are aware that the district court injunction has placed on "hold" for over two years a complex governmental effort to review and adjust its classifications of vast tracts of land. It is also beyond dispute that countless parties are affected by the uncertainties associated with the unsettled status of these lands.* For these reasons, we believe that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below.

844 F.2d 889, at 889 (App. 117a–118a) (D.C. Cir. 1988).

[6] *National Wildlife Federation v. Burford*, 699 F.Supp. 327 (D.D.C. 1988) (App. 26a–37a).

The Court of Appeals reversed this judgment on the ground that since it had found there was sufficient standing in *Burford I* to survive a motion to dismiss, that finding was the law of the case even on a motion for summary judgment. *Burford II*, at 432–433 (App. 18a–20a).[7] The Court of Appeals further said that, in any event, the affidavit of NWF member Peggy K. Peterson alone was sufficient to support standing. *Burford II*, at 431 n. 13 (App. 18a).

From the *Burford II* decision, Petitions for Writ of Certiorari were filed by Mountain States Legal Foundation, et al., in No. 89-628 and by Manuel Lujan, et al., in No. 89-640. The Petition in No. 89-640 was granted by this Court on January 16, 1990. *Amicus Curiae* is informed that, as of the writing of this brief, the Petition in No. 89-628 remains pending.

SUMMARY OF ARGUMENT

The Court should reverse *Burford II* because that opinion ignores the constitutional limits on the role of the federal judiciary. The essence of this dispute is whether NWF should be permitted to use the federal courts to change national policy and exclude mining and other resource uses on the vast areas of the public lands which are subject to this suit. This is a political question for Congress to decide, not a "case or controversy" for the courts to decide. If NWF wishes to reshape the national policy, it must do so through the democratic legislative and executive branches of the government and not through the judiciary. Accordingly, NWF's suit is barred by considerations more fundamental than standing. If this Court agrees that NWF is asking the courts to intrude on the representative branches of government, then it is not necessary to reach the question of

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[7] *"Burford II,"* the Court of Appeals opinion here under review, is reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989) (App. 1a–25a).

whether the NWF member affidavits concerning standing were sufficient.

Further, in order to grant the relief sought by NWF, the District Court will be forced to review and administer an entire governmental program. Administration of federal agency programs is neither practicably nor legally the proper use of the federal judiciary. The vastness of the public lands requires that direction for their management be provided initially by broad programs, such as the Withdrawal Review Program, to be implemented by individual actions on specific land areas. If a person is injured by such a specific action, that person may have standing to seek redress in the courts for that action, but not for the entire Program guiding other actions which do not affect that person.

Finally, this Court should find that the standing evidence offered by NWF is defective under even the most liberal standing cases. First, the allegations of injury by NWF are fatally flawed for failing to identify with particularity any lands they use which are included in the Program, the specific other uses of those lands which would injure the NWF members, or the lands which would be damaged by those other uses. Second, the injury alleged by NWF does not support standing for the over-reaching and premature relief requested.

ARGUMENT

I. THE SEPARATION OF POWERS DOCTRINE BARS NWF'S SUIT.

A. NWF's Suit Does Not Present A Justiciable Case or Controversy.

NWF's suit essentially seeks to have the judiciary run the BLM Withdrawal Review Program in accordance with NWF's view of what public land policy should be. But, it is the BLM which is charged with managing the public lands under the principles of multiple use and which is

bound to make its decisions concerning public land after considering the competing interests, as guided by the policies set forth in FLPMA and other national policies established by Congress. 43 U.S.C. 1701, 1732. The administration of the Withdrawal Review Program by the BLM is a political matter determined and delegated by Congress, not a justiciable question. The separation of powers doctrine requires the federal courts to limit their authority to justiciable questions and to refrain from the political aspects of government.[8] *Allen v. Wright,* 468 U.S. 737 (1984).

Amicus Curiae submits that the separation of powers doctrine is a concept even more fundamental than standing. Standing focuses on whether the particular plaintiff properly brings a case within the judicial limits of Article III of the United States Constitution. The separation of powers doctrine, though also rooted in Article III, focuses on the justiciability of the issue. If, in order to satisfy the plaintiff, the federal court must encroach upon the realm of the legislative or executive branch of the government, then the separation of powers doctrine bars the suit. *Allen,* above, at 759–760. Thus, the thresheld inquiry is whether, under our tripartite system of government, federal courts should undertake the case.[9]

In *Allen,* at 759–760 (emphasis added), this Court stated:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that the respondents' alleged injury "fairly can be traced to the challenged action" .... That conclusion would

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[8] This issue was raised before the Court of Appeals, but is not squarely addressed in the *Burford II* decision.

[9] An analysis of this principle is provided in Coyle, "Standing of Third Parties to Challenge Administrative Agency Actions," 76 Cal. L. Rev. 1061, 1091–1093 (1988).

> pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. *Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.*

The very problem this Court warned against in *Allen* is the situation in this case. NWF has not complained of a specific violation of law which has in fact harmed any of its members. Instead, though complaining that there are general violations of the law, NWF in reality challenges the entire program the BLM has established to carry out the congressionally mandated reviews of public land withdrawals. This Court stated that it is inappropriate to use the judiciary to restructure the programs established by the executive branch:

> When transported in the Art III context, [the principle that government be granted the widest latitude in the dispatch of its own internal affairs], grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. *The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed."* US Const, Art II, § 3. *We could not recognize respondents' standing in this case without running afoul of that structural principle.*

Allen, at 761; emphasis added.[10]

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[10] To be sure, Congress itself is guilty of intruding upon the sep-

More harm is done by allowing actions such as NWF's suit than simply an injudicious intrusion upon the proper functions of other branches of government. When special interest groups, such as NWF, succeed in convincing a court to undertake review of a governmental program, they obtain an inappropriate advantage in terms of greater clout and more attention than is warranted vis-a-vis all the other interests which should be considered in the formulation of public policy.[11] Like all advocates, special interest groups are not concerned with presenting to a court all relevant considerations which should be involved in forming public

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aration of powers by attempting to grant universal standing in some environmental legislation, such as in the Clean Air Act, 42 U.S.C. 7607(d), and in the Clean Water Act, 33 U.S.C. 1365. On the subject of these congressional intrusions it has been observed:

> Justice Scalia believes that standing is ultimately related to separation of powers concerns. The power of Congress to expand standing is, therefore, inescapably limited. In Scalia's view, congressional approval, express or implied, to expanding standing "cannot validate judicial disregard" for the boundaries that exist between branches of government.
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> A universal grant of standing, even though an "acquiescence" of Congress to judicial intervention, forces courts to hear the claims of the majority because plaintiffs need not allege palpable injuries that set themselves apart from the general public. . . . The democratic process that inheres in the executive and legislative branches, and not the undemocratic process that inheres in the courts, should resolve and protect the interests of "all-inclusive" classes of citizens.

Alpert, "Citizen Suits Under the Clean Air Act: Universal Standing For the Uninjured Private Attorney General?," 16 Boston College Environmental Affairs L. Rev. 283, 304–305 (1988–1989); footnotes omitted; referring to Justice Scalia's "The Doctrine of Standing as an Essential Element of the Separation of Powers", 17 Suffolk U. L. Rev. 881 (1983).

It is important to note that here NWF is not suing on the basis of legislation where Congress has attempted a universal grant of standing.

[11] The proper forum for special interest groups to demand attention for their agenda is through the more deliberate and democratic legislature.

policy. Instead, they focus primarily on presenting only the issues which they hope will allow them to prevail in the matter under dispute.[12] The very fact that a special interest group has convinced a court to take a case indicates that group's notion of public policy has caught the court's attention and, perhaps, the court has allowed itself to become a vehicle or even a champion of the special interest group's view of public policy. This Court has admonished the federal judiciary to refrain from such judicial activism. *See Chevron U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 865–866 (1984), wherein this Court stated:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
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> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of

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[12] Rabkin, Jeremy, *Judicial Compulsions: How Public Law Distorts Public Policy,* pp. 63–64, (1989).

> the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . .

Permitting special interest groups to bring broad policy lawsuits against administrative agencies is "essentially a means by which courts grant particular private advocates privileged claims on the conduct of public policy."[13] In his dissent in *Burford I,* Circuit Judge Williams charged that undue influence for the environmentalists' agenda was the very result in this case:

> The injunction . . . makes no effort to minimize the *aggregate* harm to the public interests in both environmental preservation and alternative activities: the district court has allowed environmental interests, however weak and however trivially they may be at risk as to particular tracts, to sweep the other interests off the board.

835 F.2d at 340 (App. 114a–115a).

Amicus Curiae submits that these concerns are very real. If NWF succeeds in proceeding with this case, then the ability of the BLM to make judgments based on the many relevant policy considerations will be limited, with undue attention being given to NWF's view. The congressionally pronounced national policy that public lands should

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[13] *Id.*, at 64.

be managed in a way which fosters domestic mining, thus, will be thwarted. As noted in the concurring opinion of Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, in *Public Citizen v. U.S. Dept. of Justice*, ____ U.S. ____, 109 S. Ct. 2558, 2573, 105 L. Ed. 2d 377 (1989), maintaining the separation of powers is one of the most vital functions of the Court. Special interest groups still may, and properly should, pursue their political agendas in the political realm of government.

Another problem (which will be further discussed in the next section of this argument) with cases such as NWF's is that the judiciary is asked to assume an enormous and time-consuming task. Instead of selecting one or even several BLM decisions resulting in some proposed activity on land which it could precisely locate and for which it might produce an injured member who actually used that land, NWF attached to its Amended Complaint (paragraph 18) a list of 788 BLM land actions, stating that its claim was not limited to those 788 land actions. NWF neither precisely located the lands involved in those actions for the court (a defect noted in the *Burford I* dissent, at 329 and 337; App. 89a–90a and 107a–108a), nor produced members who could claim injury as to any of them. NWF's goal was to have the court perform the work of the BLM while wearing NWF-supplied blinders. The District Court had monumental difficulties administering the preliminary injunction during the period it was in effect.[14] Thus, the problems that arise from suits such as NWF's dramatically reaffirm that the function of the judiciary must be kept separate from the legislative and executive functions of the government.

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[14] As noted at pages 7–8 of the Federal Petitioners' brief in support of their Petition for Certiorari (Docket 89-640), several modifications of the preliminary injunction were necessitated to limit its original scope. In at least one instance, NWF itself was constrained to ask for relief. Congress, at the behest of affected parties, legislated other limits on the effect of the preliminary injunction.

B. NWF's Suit Impermissibly Seeks Review of an Entire Governmental Program.

No matter what is thought of NWF's claims to have satisfied the required showings for standing (discussed below) and no matter what is thought of the minimal requirements which have been allowed to establish standing under cases like *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Defenders of Wildlife, Friends of Animals v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), this case is outside of the universe of cases that may properly be undertaken by the federal courts because it requires the judicial administration of an entire agency program.

This Court's opinions in *Allen*, above, and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), affirm the rule that the nation's courts cannot be in the business of running governmental programs. Not only would such involvement in the daily affairs of the federal agencies run afoul of the separation of powers doctrine, it would also be a ludicrous use of judicial resources. In this case NWF is not challenging the validity of a regulation or even the application of a regulation to a particular set of facts. Instead, NWF is challenging the entire Program being carried out by the BLM on over a hundred million acres of public land. NWF sought to control too much with too little and, thus, by its own over-zealousness, brought a suit which cannot properly be maintained.

NWF, in its brief responding to the Petitions for Certiorari, would have this Court believe that this suit is no different from others where a particular federal agency action is challenged. And, NWF cites a string of cases in footnote 21 of that brief claiming that those cases support the notion that the federal courts have frequently engaged in reviews of entire programs. Each of those cases is readily distinguishable from this case and falls into one of the following categories: (1) single agency decisions (as opposed to

the 1,250 or so decisions in this case), (2) a single interpretation of one part of an agency's mandate, (3) specific regulations, or (4) the required geographic scope of a single EIS.[15] Thus, none of the "program review" cases relied upon by NWF supports the claims made by NWF.

NWF's attempt to salvage its standing by relying on *NAACP v. Secretary of Housing & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987) is likewise unavailing. In the present case, NWF claims to be challenging a "pattern of conduct" rather than the hundreds of separate land use decisions by the BLM. The *NAACP* case did indeed allow a "pattern of conduct" challenge, but the focus was whether the Department of Housing and Urban Development was meeting its statutory goal of promoting fair housing. In fact, the court in *NAACP* expressly noted that the NAACP was not challenging the individual instances of agency action. Try as it will to claim otherwise, NWF is in fact challenging the 1,250 decisions made by the BLM. *Burford II*, at 430–431, n.12 (App. 16a).

NWF is dissatisfied that the BLM has not made environmental concerns supreme over all other factors the

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[15] The cases relied upon by NWF for review of an entire governmental program are: *UAW v. Brock*, 477 U.S. 274 (1986), interpretation of a benefits entitlement statute; *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987), geographic scope of an EIS; *Blum v. Yaretsky*, 457 U.S. 991 (1982), determination of uniform level of benefits to be applied with respect to stated medical evaluations; *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), choice of competitive bidding procedures under a statute requiring experimentation with different procedures; *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), does not address standing, pertains to an agency policy statement; *Association of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150 (1970), single decision to allow banks to engage in a certain business; *Defenders of Wildlife, Friends of Animals v. Hodel*, above, single decision concerning exemption of projects in foreign countries from application of federal endangered species statute; and *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988), challenge to twenty-one regulations, with proof of standing required as to each regulation.

BLM *by law* must consider. As noted in *Baltimore Gas & Electric Co. v. NRDC*,462 U.S. 87, 97 (1983), the National Environmental Policy Act of 1982, 42 U.S.C. 4321, *et seq.*, ("NEPA") requires agencies to consider environmental impacts before acting, but it does not require environmental issues to occupy the entire field.

And finally, NWF claims that *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), aids its standing argument. Like *Oregon Environmental Council*, above, *Kleppe* is a challenge to the geographic scope of an EIS. The Sierra Club wanted to force the Interior Department to issue a regional EIS concerning northern plains coal mining. This Court rejected that claim on the ground that there was no proposal of regional mining to be evaluated. Thus, *Kleppe* hardly offers any support for NWF's position in this case.

II. NWF FAILED TO ESTABLISH STANDING.

In holding that NWF had made an allegation of injury sufficient to establish standing, the Circuit Court below relied largely on *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, above ("*SCRAP*"). If NWF's action did present a "case or controversy" (which it does not), then this case presents an opportunity for this Court to refine its holdings in *Sierra Club v. Morton* and *SCRAP* relating to standing to sue on environmental and public land issues.

A. NWF Failed to Allege Recognizable Injury and Use of Particular Land Affected by BLM Action.

With respect to the asserted use of the lands affected by federal action, there is no relevant factual difference between *Sierra Club v. Morton*, above, and the present case. In *Sierra Club v. Morton* a ski area and attendant facilities had been proposed for construction on federal lands in an area of the Sierra Nevada mountains in California. The

Sierra Club alleged that it had a special interest in the conservation and sound management of national parks and forests and particularly of the lands on the slopes of the Sierra Nevada mountains. *See Sierra Club v. Hickel*, 433 F.2d 24, 29 (9th Cir. 1970). This Court said: "Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King [the site of the ski area] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." *Sierra Club v. Morton*, at 735. Here, the boiler plate allegations in the two NWF members' affidavits (App. 187a, 191a) that they "use the federal lands, including those in the vicinity of" a generalized area of BLM lands from which withdrawals had been revoked is substantially identical to the allegations in *Sierra Club v. Morton*. In neither *Sierra Club v. Morton* nor in the present case did the plaintiffs make sufficient allegations that any of their members used any of the particular lands in question. This was fatal to standing in *Sierra Club v. Morton* and is fatal to standing in the present case.

In fact, NWF has even less basis for standing in this case than the Sierra Club had in *Sierra Club v. Morton*. The Sierra Club objected to a specific proposed project (a ski resort) on a specific area of land. In the present case, NWF has not identified any specific proposed land use which could cause any injury, has not identified any specific land area which would be damaged, and has not identified any specific land area its members use or propose to use (other than "the federal lands"). Although this Court has broadened the categories of injury that may be alleged in support of standing to include aesthetic, conservational, and recreational values, this Court has not abandoned the requirement that identifiable damage to specific lands and particular injury to the plaintiff be alleged. *Sierra Club v. Morton*, at 734–735.

Wilderness Society v. Griles, 824 F.2d 4 (D.C. Cir. 1987), involved a challenge by the Wilderness Society and the Sierra Club to a BLM policy decision not to charge

submerged lands against the grant of acreage entitlements for Alaska and Alaskan natives. In the *Griles* case it was held that affidavits of members of the plaintiff groups, wherein it was claimed that the members visited federal lands throughout the State of Alaska, were *insufficient* to support standing. The Court of Appeals reasoned that members failed to name the specific lands they intended to visit which would be taken out of federal ownership by the challenged BLM policy. The very same flaw in standing proof defeats this case. NWF's member affidavits claimed nothing more specific than recreating "in the vicinity of" only a relatively small part of the enormous expanses of federal land affected by this suit.

B. The *SCRAP* Decision Does Not Control in This Case.

SCRAP is clearly distinguishable from the present case on at least two grounds. First, in *SCRAP* the plaintiffs did assert that they used the lands and breathed the air which they claimed would be damaged by an Interstate Commerce Commission approval of a freight rate surcharge. This Court found that the plaintiffs' allegations were sufficient to establish the "identifiable trifle" of injury necessary to show standing in that case. *SCRAP*, at 689–690. In the present case, however, the fact remains that NWF did not allege that any of its members used any of the particular lands which are subject to the Program. Therefore, not even an identifiable trifle of injury could be alleged by NWF members with respect to those lands subject to the Program.

Secondly, this Court held in *SCRAP* that a plaintiff must allege that he will "be perceptibly harmed by the challenged government action, not that he can imagine circumstances in which he could be affected by the agency's action." *SCRAP*, at 688–689. In *SCRAP*, the freight surcharge could go into effect without further governmental action and cause the events to occur which the plaintiffs alleged would cause damage. *SCRAP*, at 672–674. In contrast, as discussed further below, the government's actions

carried out under the Program cannot create any injury to NWF. It is not unless and until the BLM takes additional actions proposing to authorize particular uses to be carried out on particular lands that NWF could allege injury and then only if NWF asserts that its members use those particular lands. At this stage, NWF only imagines circumstances in which its members would be harmed.

C. The Program Causes No Injury.

This Court has ruled that the alleged injury justifying standing must be fairly traceable to the challenged action, *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41 (1976), and that the standing question bears close affinity to the question of ripeness – whether the harm asserted has matured sufficiently to warrant judicial intervention, *Warth v. Seldin,* 422 U.S. 490, 499, n. 10 (1975). In the present case the action complained of is the publication of withdrawal and classification revocation notices in the *Federal Register.* This publication merely allows the BLM to (1) consider any applications it may receive to permit resource uses on those lands and (2) evaluate the conditions under which such uses may be carried out.

NWF is premature in seeking to enjoin the revocations because it can suffer no injury until third parties apply for and receive authorization to carry out activities on the lands. Whether a land exchange will be approved, whether BLM lands will be sold, or whether rights of way will be issued, all lie within the discretion of the Secretary of the Interior. 43 U.S.C. 1716(a), 1713, 1761. Similarly, mineral leases on public lands are issued or withheld at the discretion of the Secretary. 30 U.S.C. 201, 211, 226(a), 241(a), 261, 271, 281. Further, as pointed out in the dissent in *Burford I,* at 339 (App. 111a–113a), activities conducted under the mining laws are subject to environmental review under NEPA and (for operations disturbing more than five acres) subject to BLM approval, both of which provide for public

notice and consideration of public comments.[16] 43 U.S.C. 1732; 43 C.F.R. 3809.1-4, 3809.2.

Until there is the further event where the BLM considers the approval of a proposed land use, or at least until an application has been made for use of some of these lands, any allegation by NWF of injury or threatened injury is premature. Therefore, NWF could not properly allege that the challenged withdrawal terminations and classification revocations in themselves cause any injury to anyone, much less to its members, even if the members had identified and alleged they used the lands in question.

D. The Standing Requirement and Showing of Injury Are Not Satisfied in This Three-Party Case.

Cases such as *Sierra Club v. Morton,* above, and the present case, in which a government action allows a third party who is not before the court to respond in a manner that may injure the plaintiff, have been referred to as "three-party cases." *See Wilderness Society v. Griles,* above, at 12. This Court has observed that when an alleged threatened injury could result only from the action of some third party not before the court, the indirectness of the injury weakens the links in the chain of causation and can make it substantially more difficult to meet the standing requirement. *Allen,* above, at 758–759.

In *Allen,* this Court found that it was entirely speculative whether the withdrawal of a tax exemption from

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[16] In addition to these management controls applying to activities conducted pursuant to the mining laws on public lands, an entire regime of federal and state land use and environmental permitting requirements apply to all mineral exploration and mining operations wherever they are conducted. Virtually all of those permitting procedures require public notice and the opportunity for public participation in the permitting processes. *See* 5 *Am. L. of Mining,* Chapter 166; Title XV (2d ed. 1989).

any particular school would cause parents and school officials to react in a way that would have an ultimate significant impact on the racial composition of public schools and, therefore, the parents of minority school children could not establish the necessary standing to challenge the tax exemption. *Allen,* at 759. In this case, the links in the chain of causation are even weaker because, not only would a third party resource developer have to respond to the Program, but any threat of injury to NWF would require the additional speculation that the BLM would also respond by approving a land use in a particular area.

The *Griles* decision is remarkable because it also is a three-party case dealing with public lands decided by the District of Columbia Circuit which reached a result opposite of that in *Burford II* even though it was decided by two of the same Circuit Judges who decided *Burford II.* The Circuit Court made the following observations in *Griles:*

> Where the alleged injury involves access to land in a three-party case, as in *Sierra Club, SCRAP,* and the case at bar, the judgment regarding likelihood of injury turns on whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action. Otherwise, the threat of injury would be too amorphous or uncertain; it would be no greater for the plaintiff than for any person simply opposed to the governmental action in question.

824 F.2d at 12.

In light of *Griles,* it must be considered whether the Circuit Court may have reached its conclusion in *Burford II* because it failed to realize that this case, like *Griles,* is a three-party case in which NWF was not threatened with any injury until a third party sought and was granted authorization from BLM to conduct activities on the lands.

That the *Burford II* court failed to realize this is reflected in the following statement by the court:

> Once the lands in dispute are removed from Government regulation or protection under the [Withdrawal Review] Program, and made available for private mining and other developmental uses, NWF would have no claim against those in control of the land development projects.

Burford II, at 429, n. 10 (App. 12a). This statement is plainly mistaken. As noted above, the dissent in *Burford I* correctly understood that, even in the case of mining, governmental reviews and approvals are still required after the lands have been opened to use.

NWF failed to properly allege injury in the present case, not only because it did not allege that its members use any of the lands in question, but also because it was impossible to identify which of the lands in the Program will be the subject of third-party responses (i.e., applications for leases, permits, or plan of operation approvals) and it was impossible to identify on which of those lands the BLM may consider granting approvals. In this case, actions by third parties and then further action by the BLM are required before NWF could properly allege there would be any injury to NWF. This is in contrast to *SCRAP* in which no further action by third parties or the government was necessary for events to occur which might injure those plaintiffs.

E. Nonspecific Allegations of Injury in Two Geographic Areas Cannot Extend Standing to Challenge the Entire Program.

Even if NWF could have established standing with respect to the two specific withdrawal revocations and classification terminations from lands in the vicinity of the

lands which two of its members alleged they used, this allegation of minimal injury in two geographic areas is certainly not strong enough to spread across the entire western United States and envelop into this litigation some 1,250 individual withdrawal revocations and classification terminations on more than 180,000,000 acres of public land. The Court of Appeals stated that "the applicable law governing standing requires that plaintiffs be injured by only *one* of the terminations" (emphasis by the court) in order to challenge the entire Program, citing *UAW v. Brock*, above, and *Warth v. Seldin*, above. *Burford II*, at 431, n. 12 (App. 16a). These cases relied upon by the Court of Appeals clearly do not support the extension of any NWF standing to all of the land areas and management actions involved in the Program and in this case.

UAW v. Brock simply held that it is not necessary for all members of an association to have standing in their own right for the association to have standing to challenge a Secretary of Labor policy respecting eligibility for supplemental state unemployment insurance benefits, so long as some members of the UAW could show they were injured. *UAW v. Brock*, at 284–286. In *Warth v. Seldin*, this Court denied standing to all of the individual and association plaintiffs in that case, but observed in *dicta* that "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action. . . ." *Warth v. Seldin*, at 511. The issue raised in both of those cases obviously is not an issue in this case. The number of NWF members who can allege they were injured is not in question in this case and no party has contended that NWF must allege that all of its members were injured. Therefore, neither *UAW v. Brock* nor *Warth v. Seldin* supports the holding in *Burford II* that the establishment of standing with respect to one area involved in the NWF affidavit extends that standing to hundreds of other BLM land areas and some 1,250 BLM actions.

The Court of Appeals also set forth the proposition that if the Peterson affidavit were found sufficient for standing by itself, NWF may assert the interests of the general public with respect to the entire Program. *Burford II,* at 431–432, n. 13 (App. 18a). In support of that proposition, the court cited *Sierra Club v. Morton,* above, and *Sierra Club v. Adams,* 578 F.2d 389 (D.C. Cir. 1978). In *Sierra Club v. Morton,* this Court stated that once a plaintiff establishes standing, he may assert the interests of the general public in support of his claims for equitable relief. *Sierra Club v. Morton,* at 740, n. 15. That statement, however, was made with reference to an attack on a single ski resort project. Nothing is even intimated in that case that would allow the Sierra Club to extend its standing to assert the general public interest in challenges to all other ski areas proposed on public lands in the western United States.

Sierra Club v. Adams involved the Sierra Club attempting to stop construction of a highway in the nations of Panama and Colombia. The Sierra Club first obtained an injunction against the United States' participation until an EIS was prepared and then obtained another injunction based upon three deficiencies in the EIS. The Court of Appeals simply held that once the Sierra Club established standing with respect to one issue in the EIS (spread of hoof and mouth disease) it could challenge other issues (effect of the highway on Indians in Panama and Colombia) on which the Sierra Club may not otherwise have had standing. Again, this case involved a single project and a single area of land like *Sierra Club v. Morton.* It did not determine that the Sierra Club, once having established standing with respect to the United States' participation in that highway, would have standing to challenge a United States program of participating in any other highways in South America. *Sierra Club v. Adams,* therefore, provides no authority for the conclusion reached by the Court of Appeals that, if NWF could assert the public interest in the one area in which the

court said NWF had established standing, NWF could assert the public interest for each of the remaining 1,250 or so individual classification terminations and withdrawal revocations.

CONCLUSION

The *Burford II* decision of the Court of Appeals for the District of Columbia Circuit should be reversed and the decision of the District Court for the District of Columbia District which dismissed NWF's suit should be reinstated.

Respectfully submitted,

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